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IN THE
SUPREME COURT OF THE UNITED STATES

MARK SELING, Superintendent,
Special Commitment Center,

Petitioner,

v.

ANDRE BRIGHAM YOUNG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

*SARAH BLACKMAN SAPPINGTON
Assistant Attorney General

DAVID J. HACKETT
Special Assistant Attorney General

900 Fourth Avenue, Suite 2000
Seattle WA 98164-1012
(206) 464-6430

**Counsel of Record*
Counsel for Petitioner

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANDRE BRIGHAM YOUNG,	)	No. 98-35377
	)	D.C. No.
	)	CV-94-00480-JCC
Petitioner-Appellant,	)	
	)	
vs.	)	ORDER
	)	AMENDING
DAVID WESTON,	)	OPINION AND
Superintendent of the Special	)	DENYING
Commitment Center,	)	REHEARING AND
	)	AMENDED
Respondent-Appellee.	)	OPINION
	)	

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted
April 14, 1999—Seattle, Washington

Filed May 20, 1999
Amended September 16, 1999

Before: Harry Pregerson and David R. Thompson,
Circuit Judges, and Robert J. Kelleher, District Judge.[1]
Opinion by Judge Pregerson

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[1]Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation.

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that in a federal habeas corpus action, the district court must conduct an evidentiary hearing to determine whether the conditions of confinement at the state mental institution render the state's sexual predator statute punitive as applied to the petitioner.

In federal court, appellant Andre Young sought a writ of habeas corpus. Young was confined indefinitely at the Washington State Special Commitment Center (SCC) under the State's Sexually Violent Predator Statute. His petition alleged that the conditions of his confinement were so onerous and punitive that as applied, the statute violated the Constitution.

The district court granted Young's petition, ruling that on its face, the statute violated the substantive due process provisions of the Due Process Clause because it permits indefinite confinement without a showing of mental illness; the Ex Post Facto Clause because it is punitive and applies retrospectively; and the Double Jeopardy Clause because it imposes additional incarceration on a person who has already been punished for commiting the underlying criminal offense. The State appealed.

While the appeal was pending, the Supreme Court decided *Kansas v. Hendricks*, ___ U.S. ___, 117 S.Ct. 2072 (1997), holding that Kansas's involuntary commitment statute for sexually violent predators did not violate the Substantive Due Process Clause, the Ex Post Facto Clause, or the Double Jeopardy Clause. The Kansas statute was

essentially indistinguishable from the Washington statute. The Ninth Circuit remanded Young's case to the district court for reconsideration in light of *Hendricks*.

Without conducting an evidentiary hearing, the district court denied Young's petition. Young appealed.

[1] If the Washington statute is punitive, it imposed a new punitive measure—indefinite confinement—on Young for crimes he committed before the statute's enactment, and punished Young after he served his criminal sentences for the same offenses. If Young's confinement pursuant to the Washington statute was punitive, the statute, as applied to Young, violated the Ex Post Facto and Double Jeopardy Clauses.

[2] Because the Kansas statute was modeled on and was substantially similar to the Washington statute, *Hendricks* foreclosed the claim that on its face the Washington statute violates the Ex Post Facto and Double Jeopardy Clauses. [3] But *Hendricks* did not preclude the possibility that the statute was punitive as applied.

[4] An evidentiary hearing on a habeas corpus petition is required whenever a petitioner's allegations, if proved, would entitle him to relief, and no state court trier of fact has, after a full and fair hearing, reliably found the relevant facts. [5] Young alleged facts which, if proved, would have established the punitive nature of his confinement and would have entitled him to relief. [6] The Washington courts did not afford Young a full and fair hearing concerning the conditions of his confinement. [7] Young was entitled to an evidentiary hearing in district court.

COUNSEL

Robert Boruchowitz, Defender Association, Seattle, Washington, for the petitioner-appellant.

Sarah Sappington, Assistant Attorney General, Seattle, Washington, for the respondent-appellee.

ORDER

The opinion filed May 20, 1999, is amended as follows:

Slip opinion page 4757, after the paragraph ending with footnote 4, insert:

> Actual conditions of confinement may divest a facially valid statute of its "civil" label only upon a showing by the "clearest proof" that the statutory scheme is punitive in its "effect." *Id.* at 2082. As discussed below, we conclude that Young has alleged sufficient facts that, if proved, would constitute such "clearest proof."

With this amendment, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

PREGERSON, Circuit Judge:

This case involves the constitutionality of Washington State's Sexually Violent Predator Statute as applied to petitioner Andre Brigham Young. Young has been indefinitely confined pursuant to the statute since 1990. He appeals the district court's denial of his petition for writ of habeas corpus. We have jurisdiction under 28 U.S.C. § 2253,[2] and we reverse and remand in part and affirm in part.

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[2]Because Young filed his habeas petition in 1994, the Antiterrorism and Effective Death Penalty Act of 1996 does not apply. *See Jeffries v. Wood*, 103 F.2d 827 (9th Cir. 1996).

PROCEDURAL HISTORY

This is the second time that this case is before us.

The district court originally granted Young's petition on cross-motions for summary judgment on the ground that the statute, R.C.W. § 71.09 ("Washington statute" or "statute"), violated the United States Constitution. *See Young v. Weston*, 898 F.Supp. 744 (W.D. Wash. 1995) ("*Young I*"). When it granted the petition, the court ruled that the statute, on its face, violated (1) the substantive due process protections of the due process clause because it permits indefinite incarceration without a showing of mental illness, (2) the *ex post facto* clause because it is punitive and applies retrospectively, and (3) the double jeopardy clause because it imposes additional incarceration on a person who has already been punished for the commission of a criminal offense. *See id.* Because the court found the statute to be facially unconstitutional, it denied as unnecessary Young's request for a hearing.

Respondent appealed to this court. While the appeal was pending, the Supreme Court issued *Kansas v. Hendricks*, 117 S.Ct. 2072 (1997). In *Hendricks*, the Supreme Court held, *inter alia*, that Kansas's involuntary commitment statute for sexually violent predators ("Kansas statute") did *not* violate the substantive due process, *ex post facto*, or double jeopardy clauses of the United States Constitution. Our court then remanded this matter to the district court for reconsideration in light of *Hendricks*. *See Young v. Weston*, 122 F.3d 38 (9th Cir. 1997) ("*Young II*").

On remand, the district court received supplemental briefing on the impact of *Hendricks*. After oral argument, but without conducting an evidentiary hearing, the district court denied Young's petition. *See Young v. Weston*, No. CV-94-00480C (W.D. Wash. filed Feb 10, 1998) ("*Young III*"). Young timely appealed.

DISCUSSION

Young's challenge to his indefinite confinement raises numerous issues, which can be grouped into four general categories: (1) whether the Washington statute violates the *ex post facto* and double jeopardy clauses of the United States Constitution, because the statute's *effect* is punitive; (2) whether the interpretation and implementation of the statute violates the substantive due process protections of the due process clause of the United States Constitution; (3) whether the statute, on its face and as interpreted by the Washington Supreme Court, violates the equal protection clause of the United States Constitution; and (4) whether Young's confinement is unlawful because (a) he was denied a constitutionally required probable cause hearing, and (b) the commitment trial court committed several trial errors.

I.

[1] The linchpin of this case is whether the Washington statute, as applied to Young, is punitive and thereby subject to the *ex post facto* and double jeopardy clauses of the United States Constitution. The *ex post facto* clause "forbids the application of any new punitive measure to a crime already consummated." *Hendricks*, 117 S.Ct. at 2086 (internal quotation marks and citations omitted); U.S. Const., art. 1, § 10. The double jeopardy clause prevents the state from "punishing twice, or attempting a second time to punish criminally, for the same offense." *Id.* at 2085 (internal quotation marks and citations omitted); U.S. Const., amend. 5. If the Washington statute is punitive, then it (1) imposes a new punitive measure—indefinite commitment—on Young for crimes he committed before the statute's enactment, and (2) punishes Young again, after he has already served his criminal sentences, for the same criminal offenses. Therefore, if Young's confinement pursuant to the Washington statute is punitive, then the statute, as applied to Young, violates the *ex post facto* and double jeopardy clauses of the United States Constitution.

A.

[2] In *Hendricks*, the Supreme Court held that, because involuntary confinement pursuant to Kansas's civil commitment statute is *not* punitive, that statute's operation does not raise *ex post facto* or double jeopardy concerns. *See Hendricks*, 117 S.Ct. at 2085-96. Because the Kansas statute was modeled on and is substantially similar to the Washington statute,[3] *Hendricks* forecloses the claim that the Washington statute, on its face, violates the *ex post facto* and double jeopardy clauses.

[3] But *Hendricks* does not preclude the possibility that the Washington statute, *as applied*, is punitive. *See id.* at 2082. In fact, both the majority and concurring opinions in *Hendricks* turn repeatedly to the question whether the conditions of Hendricks's confinement rendered the Kansas statute punitive. *See id.* at 2082, 2085 (majority opinion); *see also id.* at 2087 (Kennedy, J., concurring). Heeding Justice Kennedy's reminder that our concern is *not* "how long [Young] and others like him should serve a criminal sentence," but rather "whether it is the criminal system or civil system which should make the decision," *id.* at 2087 (Kennedy, J., concurring), we must determine whether Young's confinement is criminal rather than civil. And, following the dictates of *Hendricks*, we look to the *conditions* of Young's confinement when we make that determination.[4]

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[3] For a brief description of the Washington statute, see *Young I*, 898 F.Supp. at 746-48.

[4] Relying on *Hudson v. United States*, 118 S.Ct. 488 (1997), Washington argues that the conditions of confinement are irrelevant to the court's inquiry. We disagree. Whereas *Hudson* involved monetary penalties and occupational disbarment, *see id.* at 493, this case involves confinement. In cases considering the question whether confinement is criminal or civil, the Supreme Court has always looked to the actual conditions of confinement. *See, e.g., Hendricks*, 117 S.Ct. at 2082-85; *Allen v. Illinois*, 478 U.S. 364, 373-74 (1986); *see also Bell v. Wolfish*, 442 U.S. 520, 535-39 (1970).

Actual conditions of confinement may divest a facially valid statute of its "civil" label only upon a showing by the "clearest proof" that the statutory scheme is punitive in its "effect." *Id.* at 2082. As discussed below, we conclude that Young has alleged sufficient facts that, if proved, would constitute such "clearest proof."

B.

Young has exhausted his claim that his conditions of confinement at the Special Commitment Center render the Washington statute, as applied to him, punitive. Not only did Young raise the "substance" of his claim to the Washington state courts, *see Picard v. Connor*, 404 U.S. 270, 277-78 (1971); *Chacon v. Wood*, 36 F.3d 1459, 1467 (9th Cir. 1994), but he repeatedly attempted to present to the state courts evidence of the conditions of his confinement and the quality of treatment at the Special Commitment Center. The fact that the state courts refused to receive this evidence does not render Young's claim unexhausted.

C.

[4] "An evidentiary hearing on a habeas corpus petition is required whenever a petitioner's allegations, if proved, would entitle him to relief, and no state court trier of fact has, after a full and fair hearing, reliably found the relevant facts." *Turner v. Marshall*, 63 F.3d 907, 815 (9th Cir. 1995) (internal quotation marks and citations omitted). In reviewing the district court's failure to hold an evidentiary hearing, this court considers the following questions: (1) did Young allege facts which, if proved, would entitle him to relief, and (2) if so, did a state court reliably find the relevant facts.

[5] We hold that Young alleged facts which, if proved, would establish the punitive nature of his confinement and would entitle him to relief. Young's initial allegations before the district court included the following:

- Young is subject to conditions more restrictive than those placed either on true civil commitment detainees or even those placed on state prisoners;[5]
- Young has been subject to such conditions for more than seven years;[6]
- The Special Commitment Center is located wholly within the perimeter of a larger Department of Corrections facility and relies on the Department of Corrections for a host of essential services, including library services, medical care, food, and security;[7]
- The conditions of confinement at the Special Commitment Center are not compatible with the Washington statute's treatment purposes;[8]
- The conditions and restrictions at the Special Commitment Center are not reasonably related to a legitimate non-punitive goal;[9] and
- The conditions of confinement at the Special Commitment Center do not comport with substantive due process.[10]

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[5] *Compare Hendricks*, 117 S.Ct. at 2082; *Allen*, 478 U.S. at 373-74.

[6] *Compare Hendricks*, 117 S.Ct. at 2085.

[7] *Compare id.*

[8] *Compare Allen*, 478 U.S. at 373.

[9] *Compare Bell*, 441 U.S. at 539.

[10] *Compare Bell*, 441 U.S. at 535, 536.

In Young's motion to alter the district court's judgment denying his writ of habeas corpus, Young presented further allegations:

> - Court-appointed Resident Advocate, psychologist Stanley Greenberg, concluded in his final report, "[b]ecause the SCC [Special Commitment Center] hasn't fundamentally changed over so many years, even with a court injunction, I have come to suspect that it is designed and managed, either overtly or covertly, to punish and confine these men and women to a life sentence without any hope of release to a less restrictive setting";
>
> - The Department of Corrections staff's role in running the Special Commitment Center had increased: daily Department of Corrections security "walk-throughs"; continued Department of Corrections responsibility for Special Commitment Center residents' medical care (including requirements that residents be shackled and dressed in prison jumpsuit when taken to the Washington State Reformatory infirmary); and continued Department of Corrections responsibility for meals;[11]
>
> - Special Commitment Center residents were housed in units that were, according to Special Master Janice Marques, "clearly inappropriate for individuals in a mental health treatment program";[12] and

[11] *Compare Hendricks*, 117 S.Ct. at 2085.

[12] *Compare Allen*, 478 U.S. at 373.

> - There were still no certified sex-offender treatment providers at Special Commitment Center.[13]

By alleging that Washington's sexually violent predator statute is punitive as applied, Young alleged facts which, if proved, would entitle him to relief. Therefore, we must consider whether a state court reliably found the relevant facts.

[6] It is clear to us that the Washington state courts did not afford Young a full and fair hearing concerning the conditions of confinement in the Special Commitment Center. The trial court refused to allow Young to present factual evidence on the actual conditions of confinement and the quality of treatment at trial either in a challenge to the law or before the jury. Nor did Young's factual challenge regarding the conditions of confinement receive a full and fair hearing by the Washington Supreme Court. Indeed, despite its consideration of the question whether the actual impact of the statute was criminal, *see In re Young*, 122 Wash.2d 1, 19 (1993), the Washington Supreme Court declared in its discussion of Young's substantive due process claims that the issues of the actual conditions of confinement and the quality of treatment were "not before the court." *Id.* at 35.

[7] "The power of inquiry on federal habeas corpus is plenary." *Rhoden v. Rowland*, 10 F.3d 1457 (9th Cir. 1993) (internal quotation marks and citations omitted). Here, where the state trier of fact did not afford Young a full and fair hearing concerning the conditions of confinement in the Special Commitment Center, Young is entitled to an evidentiary hearing in federal district court. *See Chacon*, 36 F.3d at 1465-66; *see also Townsend v. Sain*, 362 U.S. 293, 313 (1963), *overruled in part by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5 (1992).

[13] *Compare Hendricks*, 117 S.Ct. at 2085.

II.

Young also argues that the Washington courts' interpretation of the term "mental abnormality" is so vague as to violate his right to substantive due process. As the district court correctly concluded, this argument is not supported by the law. *See Hendricks*, 117 S.Ct. at 2081 & n.3; *id.* at 2080; *Heller v. Doe*, 509 U.S. 312, 314-15 (1993); *Allen v. Illinois*, 478 U.S. 364, 366 (1986). Therefore, while the statute's failure to limit its reach to those who completely lack control may be an indicia of a forbidden deterrent purpose, this failure does not, by itself, render the statute unconstitutional.

III.

Young further contends that the Washington statute, on its face and as interpreted by the Washington Supreme Court in *In re Young*, 122 Wash.2d at 41, violates equal protection. Applying the heightened scrutiny standard, the district court concluded that the classifications that Young challenges are substantially related to the achievement of an important governmental interest. This conclusion was not in error.

IV.

Young's final claims pertain to alleged errors in his particular commitment procedure.

A.

Young argues that the trial court's failure to hold a constitutionally required probable cause hearing warrants reversal. Because Young offers no support for his argument that this omission had any bearing on the ultimate outcome of his trial, this omission does not entitle Young to relief.[14] *Cf.*

[14]To the extent that Young's claim of prejudice relies on his argument that he was deprived of the opportunity to present less-restrictive alternatives to confinement based on his situation at the time of his initial confinement, this issue is not before the court. The Washington state courts have yet to render a final judgment on the issue of less-restrictive alternatives to Young's confinement.

Powell v. Nevada, 511 U.S. 79, 84 (1994); *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975).

To be sure, Washington's refusal to allow Young to appear before any court for four months—where those facing commitment under Washington's regular civil commitment statute are entitled to a *prompt* probable cause hearing—may be an indicia of the statute's punitive purpose or effect. Nevertheless, the omission of such a hearing in this case does not, by itself, require reversal.

B.

Finally, Young argues that the district court erred in finding that several alleged trial errors did not require reversal. We disagree and affirm the district court's rulings with regard to these alleged errors.

CONCLUSION

Because the district court did not conduct an evidentiary hearing on the question whether the conditions of Young's confinement at the Special Commitment Center rendered the statute punitive as applied to Young, we reverse and remand for further proceedings on the *ex post facto* and double jeopardy clause claims. We affirm the district court on all other grounds.

REVERSED and REMANDED in part. AFFIRMED in part.

[FILED]
[October 19, 1999]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Andre Brigham Young	)	No. 98-35377
	)	
Petitioner-Appellant,	)	ORDER
	)	
v.	)	
	)	
DAVID WESTON,	)	
	)	
Respondent-Appellee.	)	

Before: PREGERSON and THOMPSON, Circuit Judges, and KELLEHER, District Judge.[1]

The motion to stay the issuance of the mandate is granted.

[1] Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation.

[FILED]
[February 10, 1998]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDRE BRIGHAM YOUNG	)	
	)	
Petitioner,	)	No. C94-480C
	)	
v.	)	ORDER
	)	
DAVID WESTON, Superintendent of the Special Commitment Center,	)	
	)	
Respondent.	)	

INTRODUCTION

On August 25, 1995, this Court granted petitioner's writ of habeas corpus, finding Washington's sexually violent predator statute, RCW § 71.09, ("SVP") unconstitutional on its face. Adhering to the principle that the dictates of the Constitution apply even to those who have committed terrible crimes and who are reviled by the community, the Court found that the SVP violated three core tenets of the Constitution: the statute violated substantive due process because it permits indefinite incarceration without a showing of mental illness, the ex post facto clause because it was punitive and applied retrospectively, and double jeopardy as it imposes additional incarceration on a person who has been punished already for the commission of a sexually violent offense.

Respondent appealed to the Ninth Circuit Court of Appeals, which remanded for reconsideration in light of the U.S. Supreme Court's decision in *Kansas v. Hendricks*, 521 U.S. ___, 117 S. Ct. 2072 (1997). *Hendricks* rejected a constitutional challenge to the Kansas involuntary commitment statute for sexually violent predators, and addressed the same three legal challenges on which this Court based its previous Order. This Court ordered supplemental briefing and on January 30, 1998, heard oral argument. The Supreme Court having set the law of the land in *Hendricks*, this Court is now compelled to deny relief to Mr. Young and find that the SVP does not violate substantive due process, the ex post facto clause, or double jeopardy. Nor can the Court find for petitioner on claims which are outstanding from the 1995 summary judgment motions.

ANALYSIS

I. Punitive Nature of Statute

The Supreme Court found that Kansas's statute is not punitive and is thus constitutional under the jurisprudence governing civil commitments. The Kansas statute was modeled after the Washington statute and the two are identical in all relevant respects. Young argues that if this Court goes beyond the face of the statute, Young has provided "the clearest proof" that, unlike Kansas's statute, Washington's "statutory scheme is so punitive either in intent or effect" that this Court should once again strike down Washington's statute.

In finding the Kansas statute non-punitive, however, the Supreme Court considered and found unpersuasive much of the same kind of evidence presented by Young. First, Young argues that Washington's treatment program does not provide sufficient treatment for those incarcerated under

71.09.[1] Kansas had initial difficulties in establishing a treatment program also, *Hendricks*, 117 S. Ct. at 2085, but because states enjoy "wide latitude in developing treatment regimes," *id.* at n.4, the Supreme Court looked past those difficulties and focused primarily on the face of the statute instead. The Court focused on the language of the statute and found that "the State has a statutory obligation to provide care and treatment for [persons adjudged sexually dangerous] designed to effect recovery and [the Court] may therefore conclude that 'the State has . . . provided for the treatment of those it commits." *Hendricks*, 117 S. Ct. at 2084. The statutory language the Supreme Court found relevant is identical in the Kansas and Washington statutes.[2]

Second, Young presents evidence that some of the statute's official supporters saw it as an opportunity to permanently confine dangerous sex offenders.[3] The same was true in Kansas.[4] Where the state expressly disavows any punitive intent, and the structure of the statute supports treatment and release, however, the Supreme Court has found that such statements do not prove a contrary intent.

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[1] The evidence on which that argument is based, *Turray v. Seling*, No. C91-664WD (W.D. Wash.), was not before the Washington State Supreme Court.

[2] Compare RCW § 71.09.060(1) with Kan. Stat. Ann. § 59-29a07(a).

[3] In Washington, the SVP's chief drafter saw the SVP as filling a gap between criminal sentences and civil commitment for those sex offenders who admittedly are not "mentally ill" and as part and parcel of efforts for "strengthening and toughening, lengthening sentences" for criminal sex offenders.

[4] In Kansas, "some of the Act's official supporters [saw] in it an opportunity permanently to confine dangerous sex offenders . . . . Others thought that effective treatment did not exist . . . ("Because there is no effective treatment for sex offenders, this Bill may mean a life sentence for a felon that is considered a risk to women and children. SO BE IT!)" *Hendricks*, 117 S. Ct. at 2093.

Given the Supreme Court's finding that the Kansas statute is not punitive, this Court must find that the Washington statute is similarly non-punitive.[5] Since the statute is not a criminal commitment scheme, the concepts of the ex post facto clause and double jeopardy do not prohibit involuntary commitment for sexually violent predators.

II. Substantive Due Process

Young also argues that his situation makes real Justice Kennedy's warning that when the term "mental abnormality" is shown to be "too imprecise," the law should be voided. 117 S. Ct. at 2087. Young contends that in light of Justice Kennedy's concurrence, the majority opinion should be narrowly construed, essentially to require: (1) diagnosis of a recognized paraphilia; and, (2) "lack of volitional control, coupled with a prediction of future dangerousness." Additionally, Young argues that the burden of proof used in the SVP violates substantive due process.

1. Recognized Paraphilia

The majority found that Hendricks met Kansas's statutory criteria and his commitment under the statute was not unconstitutional because, in part, "[t]he mental health professionals who evaluated Hendricks diagnosed him as suffering from pedophilia, a condition the psychiatric profession itself classifies as a serious mental disorder . . . ." 117 S. Ct. at 2081 (internal citations omitted). Justice Kennedy also found important the fact that Hendricks' "mental abnormality" -- pedophilia -- is at least described in the DSM-IV." 117 S. Ct. at 2087. Justice Breyer's dissent also emphasized that the psychiatric profession "classifies the kind of problem from which Hendricks suffers as a serious mental disorder." Id. at 2088.

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[5] The dissent even notes that the Kansas statute is more punitive than any other similar statute, including Washington's, as it does not provide for a less restrictive alternative. *See Hendricks*, 117 S. Ct. at 2094.

Young, on the other hand, was found to have a "mental abnormality" which is a "paraphilia not otherwise specified," i.e. rape. Rape is not recognized as a paraphilia in the DSM-IV. Nonetheless, the Supreme Court made clear that a mental abnormality did not have to be a recognized mental illness for the statute to be constitutional. 117 S. Ct. at 2081 & n.3 ("when a legislature 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation'").

2. "lack of volitional control, coupled with a prediction of future dangerousness"

The Court stressed that "Hendricks even conceded that, when he becomes 'stressed out,' he cannot 'control the urge' to molest children. This admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." 117 S. Ct. at 2081. While the majority refers to a "volitional impairment rendering [sex predators] dangerous beyond their control" and "the class of persons eligible for confinement to those who are unable to control their dangerousness," *id.* at 2080, this Court reads *Hendricks* to require only that it be "difficult, if not impossible, for the person to control his dangerous behavior." *Id.* Indeed, Hendricks conceded his inability to control his criminal urges only when he is "stressed out." The Washington statute similarly does not require a complete inability to control the criminal urges associated with the diagnosed "mental abnormality." Young is correct that as applied to him the SVP may have some measure of deterrent effect since it does not require a person be utterly incapable of control under any circumstance. Yet, when faced with that same scenario in Hendricks's case, the Supreme Court overlooked that deterrent effect and did not find it sufficient to render the statute punitive.

Hendricks also reconfirmed that predicting dangerousness was legally possible. 117 S. Ct. at 2080. Such a prediction was made in Young's case. Thus, both conditions which existed in *Hendricks* exist in Young's case as well.

3. Burden of Proof

In *Addington v. Texas*, 441 U.S. 418 (1979), the Court held that substantive due process requires "clear and convincing proof" of both "mental illness" and "dangerousness." Young argues that the SVP does not meet that threshold because it requires only "proof beyond reasonable doubt" that a person will "more likely than not," 71.09.020(3), "engage in predatory acts of sexual violence." 71.09.020(1). In essence, argues Young, the statute uses the preponderance standard rejected in *Addington*.

The Kansas statute, § 59-29a02(a), uses precisely the same language, however, and *Hendricks* determined that the statute does not violate substantive due process. This Court need go no further.[6]

II. *Frye* Hearing

Young argues that procedural due process and evidentiary rules require that scientific evidence used as the basis for commitment meet the requirements of science as set forth in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). Young contends that the technique employed by the expert, i.e. clinical prediction, is not reliable and thus has not

[6] Young also argues the term "likely" violates equal protection. That argument is predicated on a finding that 71.05 has a more lenient standard than 71.09 in proving dangerousness. As determined by Hendricks, that is not the case. Young also argues that clear and convincing evidence of a substantial risk of dangerousness is a higher standard of proof because it requires a recent overt act, *In re Harris*, 98 Wash. 2d at 284, whereas 71.09 does not. Whether or not an overt act should be required is a different equal protection question, however, which is discussed below. As discussed infra, III.A., the government's argument that the equal protection challenge is unexhausted is rejected.

"achieved general acceptance" in the relevant scientific community. *Frye*, 293 F. 1014. Be that as it may, the Supreme Court has accepted clinical predictions of dangerousness to be reliable enough for a variety of purposes, including for evidentiary purposes in civil commitment proceedings. *See Foucha v. Louisiana*, 504 U.S. 71, 75 n.3 (1992).

In Washington, clinical predictions of future dangerousness are also considered sufficiently accurate and reliable for evidentiary purposes. *In Re Young*, 122 Wash. 2d 1, 56-57 (1993); *State v. Pryor*, 115 Wash. 2d 445, 454 (1990); *In Re Harris*, 98 Wash. 2d 276, 280 (1982). The *In Re Young* court adopted the *Harris* court finding that Young's argument "would eviscerate the entire law of involuntary commitment as well as render dubious the numerous other areas where psychiatry and the law intersect . . . ." 122 Wash. 2d at 56. Young's *Frye* argument thus fails to support affirmance of the writ.

III. Equal Protection

Young's equal protection challenge compares 71.09 as a whole to 71.05 as a whole. However, in the Washington Supreme Court only certain sections of the statutes were compared and briefed. In his summary judgment motion and the supplemental briefing before this Court, Young compares some of the same sections and adds additional comparisons that allegedly violate equal protection.

A. Exhaustion

Exhaustion of state remedies requires petitioner to have "fairly presented" federal claims to the state courts in order to give the State the "opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Picard v. Connor*, 404 U.S. 270, 275 (1971) (internal citations and quotation marks omitted). "A federal claim is fairly presented if the petitioner has described the operative facts and legal theory upon which his claim is based." *Rice*

v. Wood, 44 F.3d 1396 (9th Cir. 1995), *opinion vacated in other part*, 77 F.3d 1138 (9th Cir. 1996).

Young's habeas petition states a general equal protection challenge, and then specifically refers to the "recent overt act" requirement and the right to remain silent. The government argues that, other than the right to remain silent, all the equal protection challenges are unexhausted as they were not presented to the Washington State Supreme Court. In fact, however, the Washington State Supreme Court was specifically presented with equal protection challenges to the following sections: 71.05.240 (requirement of probable cause hearing within 72 hours, need to consider less restrictive alternatives), 71.05.280 (grounds for 90 day confinement), 71.05.310 (jury trial on petition for 90 day treatment, follow rules of evidence pursuant to 71.05.250 and due process), 71.05.320 (provisions for additional confinement, consideration of less restrictive alternative). And, the Washington State Supreme Court undertook an equal protection analysis of the "overt act" requirement. *Young*, 122 Wash. 2d at 44.

Accordingly, petitioner has exhausted his equal protection claims which are related to the sections of the SVP presented to the Washington State Supreme Court, as well as the "overt act" distinction created by the Court's equal protection analysis. This Court addresses the following claims below: (1) 71.09 does not provide the right to remain silent that 71.05 does; (2) 71.09 provides for less frequent judicial review of the commitment; (3) 71.09 does not require a "recent overt act" to prove dangerousness for those currently incarcerated as opposed to those who have been released; and, (4) 71.09 probable cause hearings do not provide the same protections as 71.05 hearings. Other arguments raised in the briefing were not raised to, or addressed by, the Washington State Supreme Court, nor were they raised in the habeas petition, so they are not considered by this Court.

B. Standard of Review

The parties differ as to what level of review is appropriate. The U.S. Supreme Court has never applied heightened scrutiny to involuntary commitment cases, but has applied the "rational relation" test. *See, e.g., Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972); *Baxstrom v. Herold*, 383 U.S. 107. However, as the Ninth Circuit pointed out in *Hickey v. Morris*, 722 F.2d 543 (1983), those cases were decided before the development of the "heightened scrutiny" test, which had its genesis in Justice Powell's concurring opinion in *Craig v. Borden*, 429 U.S. 190 (1976). In *Hickey*, the Ninth Circuit applied heightened scrutiny and rejected an equal protection challenge to the statute governing commitments of insanity acquitees. The Court specifically reserved the question of whether or not heightened scrutiny was the appropriate standard, however.

Subsequent to *Hickey*, the Supreme Court applied rational basis review in *Heller v. Doe*, 509 U.S. 312 (1993). It did so not because it found heightened scrutiny inapplicable to involuntary commitments, but because the parties had been litigating for years on the theory of rational basis review, because respondent had sought to use heightened scrutiny for the first time in the Supreme Court, and because "it would be imprudent and unfair to inject a new standard at this stage of this litigation. 509 U.S. at 319.

Although the question of the appropriate standard of review remains open, this Court will follow the Ninth Circuit's lead and apply "heightened scrutiny."

C. The Right to Remain Silent

The Washington Supreme Court found that the failure of 71.09 to provide the right to remain silent during the commitment trial did not violate equal protection because persons committed under 71.09 "are not similarly situated to the mentally ill in regard to the treatment methods employed,

or the information necessary to ensure that they receive proper diagnosis and treatment." 122 Wash. 2d at 51. The Court relied on the legislature's findings and found that:

> The problems associated with the treatment of sex offenders are well documented, and have continued to confound mental health professionals and legislators. The mental abnormalities or personality disorders involved with predatory behavior may not be immediately apparent. Thus, their cooperation with the diagnosis and treatment procedures is essential.

Young, 122 Wash. 2d at 52.

The government argues that because of the "profound public safety implications of sexual predator proceedings," it is more important to have a personal interview in 71.09 than in 71.05 for proper treatment and diagnosis. However, as the Washington court correctly found, quoting *Baxstrom*, 383 U.S. at 111, "the dangerousness of the detainee may be a reasonable distinction for purposes of determining the type of *custodial or medical care* to be given, but it has *no relevance whatever* in the context of the opportunity to show whether a person is mentally ill *at all*." 122 Wash. 2d at 45 (emphasis in original).

As petitioner accurately points out, the differences in *treatment* are not relevant when determining whether or not a person is a sex predator. The objective of treatment is not served by forcing a person to cooperate with a mental health expert prior to commitment. However, an accurate *diagnosis* is relevant to the commitment proceedings, as commitment is based in large part on an expert's diagnosis of the person as a sex predator. Thus, cooperation with a state expert may be important for diagnostic purposes. The government explains that diagnosing a "sex predator" is unlike diagnosing a mentally ill person because of the difficulty in making the diagnosis since it is "not immediately apparent" if a person

has "the mental abnormalities or personality disorders involved with predatory behavior" and as there is no requirement of a recent overt act. Although in Young's case the state's expert said that an in-person assessment would not change his "diagnostic impression" because the most important factor for him was past history, the Court cannot conclude that the government is incorrect in asserting that an in-person interview still is important for the expert to come to a conclusion based on more than just a diagnostic impression. The government has shown a substantial relation between forced cooperation and a legitimate government interest (correct diagnosis).

D. Frequency of Judicial Review of Commitment

Young argues that 71.05 requires review at 72 hours, then at 14, 90, and 180 days, but that 71.09 has only a 72 hour, a 45 day, and an annual review. The government responds that the differences are substantially related to the differences in the two populations.

The government argues that the 45 day pre-trial detention (versus 14 days) is needed for a thorough evaluation, which includes personal interviews, of the detainee before trial. Additionally, the time is necessary for trial preparation by counsel as the trials are lengthy and complex. The Court finds these differences to be substantial reasons for the additional days of pretrial detention. Moreover, Young waived his right to a jury in 45 days and delayed the trial for four months, so he is not in the position to argue that the delay in 71.09 harmed him.

As for review after commitment, the two groups are not similarly situated for treatment purposes and the difference in frequency of review is substantially justified by the significant difference in treatment possibilities. Sexual predators are "generally . . . unamenable to existing mental illness treatment modalities . . . ." RCW 71.09010. On the other hand, those committed under 71.05 may be treated

under "existing mental illness treatment modalities" as they are in fact mentally ill.

E. Recent Overt Act

The Washington Supreme Court sua sponte engrafted a requirement that in order to commit "sex predators" who had been released into the community prior to commencement of SVP proceedings, the government had to prove dangerousness with a recent overt act. But, for those still serving their criminal sentences at commencement of SVP proceedings the government does not need to prove dangerousness with a recent overt act. Although the Washington court couched its analysis in substantive due process terms, in essence it found that the two groups were not similarly situated because a detainee does not have access to possible victims compared with a person who has been released who does have the opportunity to commit an overt act. The same analysis applies in the equal protection context. Since the the two groups are dissimilar, they need not be treated the same under the Constitution.

F. Probable Cause Hearing

The Washington Supreme Court found that equal protection required a probable cause hearing within 72 hours for detainees under 71.09. But, it found that the lack of such a hearing was harmless error in Young's case. 122 Wash. 2d at 43-47. Young argues that under *In re Swanson*, 110 Wash. 2d 21, 31 (1990), the Court should have automatically reversed once it found error and harmless error analysis is inapplicable.• Young's cite is to dicta in *Swanson* which said that if the state "had totally disregarded the requirements of the statute, or had failed to establish legal grounds for Swanson's commitment," dismissal would have been proper. *Id.* Here, there was no statutory mandate that the state "totally disregarded" and the state did establish the legal grounds for Young's commitment. Thus, it is not the kind of case envisioned in *Swanson* where reversal is the appropriate remedy.

IV. Cumulative Trial Errors

Young also argues that cumulative trial errors made the outcome of his trial fundamentally unfair. *Estelle v. McGuire*, 502 U.S. 62 (1991). In state court, Young did not argue cumulative errors, only that each of the errors violated due process. The claim is therefore unexhausted. Even if he had exhausted the claim, however, he has not shown that the trial was so unfair as to violate the narrowly defined class of rights such as those specifically enumerated in the Bill of Rights. *Estelle*, 502 U.S. at 78. While adherence to state evidentiary rules suggest the trial was fair, "it is certainly possible to have a fair trial even when the state standards are violated . . . ." *Jammal v. Van DeKamp*, 926 F.2d 918, 919 (9th Cir. 1991). For the same reasons the Washington Supreme Court found that the trial court either did not commit errors or that the errors were harmless, the Court finds that Young has not stated a cognizable claim in habeas.

CONCLUSION

Petitioner's writ of habeas corpus is hereby DENIED.

DATED this 10th day of February, 1998.

s/JOHN C. COUGHENOUR
United States District Judge

[Filed August 9, 1993]

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of ANDRE BRIGHAM YOUNG, Petitioner.	)	No. 57837-1 En Banc
In the Detention of ANDRE BRIGHAM YOUNG, Appellant.	)	
In re the Personal Restraint Petition of VANCE RUSSELL CUNNINGHAM, Petitioner.	)	No. 57838-9
In re the Detention of VANCE RUSSELL CUNNINGHAM, Appellant.	)	

[As amended by order of the Supreme Court August 12, 1993. Citations have been updated from original.]

DURHAM, J. -- In this case, the sexually violent predator provisions of the Community Protection Act of 1990 are challenged by two people who have been civilly committed under its authority. Important constitutional and

technical issues are raised by this unique legislation, which seeks to protect our citizens by incapacitating and attempting to treat those whose mental abnormalities create a grave risk of future harm. Although the ultimate goal of the statute is to treat, and someday cure those whose mental condition cause them to commit acts of sexual violence, its immediate purpose is to ensure the commitment of these persons in order to protect the community. In this sense, it is similar to any other civil commitment. However, the Legislature has found that the exceptional risks posed by sexual predators, and the seemingly intractable nature of their illness, necessitates a specially tailored civil commitment approach. After exhaustive review of the numerous challenges raised by petitioners, we conclude that the sex predator provisions of the Community Protection Act of 1990 are constitutional. However, for reasons stated below, we reverse petitioner Cunningham's commitment, and remand petitioner Young's case for consideration of less restrictive alternatives.

The numerous issues raised by Young and Cunningham can be categorized as follows: First, petitioners claim that the act violates the ex post facto clause and the prohibition against double jeopardy. Resolution of those issues depends on whether the law is civil or criminal in nature. Second, petitioners raise several substantive due process arguments. They claim that the State lacks sufficient justification to deprive them of their liberty, and that the sex predator statute amounts to unconstitutional preventive detention. They also contend, as a substantive matter, that dangerousness must be proved by evidence of a recent overt act, and that they are entitled to less restrictive conditions of confinement. Third, petitioners argue that there are several procedural deficiencies. They claim that the probable cause hearing should not be held ex parte, that the jury verdict should be unanimous, that the selection of the juries was flawed, that the act is void for vagueness, and that they were unconstitutionally denied a right to remain silent. Finally, several evidentiary issues are raised.

I

BACKGROUND

1. The Act.

The Community Protection Act of 1990 (the Act) was passed in response to citizens' concerns about the State's laws and procedures regarding sexually violent offenders. *See* Governor's Task Force on Comm'ty Protec., *Final Report* I-1 (1989) (hereinafter *Report*). The impetus for convening the task force was the commission of two violent crimes: the murder of a Seattle woman by an offender on work release, and the violent sexual attack on a young Tacoma boy. *Report*, at I-1. The Act contains 14 separate sections, dealing with such topics as registration of sex offenders, crime victims' compensation, background checks, and increased penalties for sex offenders. Laws of 1990, ch. 3, p. 12.

Part X of the Act is entitled "Civil Commitment" and is codified at RCW 71.09 (hereinafter Statute). Under the Statute, those defendants who are determined to be "sexually violent predators" can be involuntarily committed after they have served their sentences. The Legislature enacted extensive findings. Among those, the Legislature stated:

> In contrast to persons appropriate for civil commitment under chapter 71.05 RCW, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. . . . The legislature further finds that the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are

> very different than the traditional treatment modalities . . ..

RCW 71.09.010.

A "sexually violent predator" is someone "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." RCW 71.09.020(1). Crimes of sexual violence are enumerated in the Statute, and include crimes not usually considered sex offenses if they are determined beyond a reasonable doubt to have been "sexually motivated". RCW 71.09.020(4)(c). The term "personality disorder" is not defined by the Statute, but the term "mental abnormality" is defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts". RCW 71.09.020(2). "Predatory" acts are those directed at strangers, or individuals groomed by the offender for the purpose of victimization. RCW 71.09.020(3).

Under the Statute, when a person's sentence for a sexually violent offense has expired or is about to expire, the State is authorized to file a petition alleging the person to be a sexually violent predator. RCW 71.09.030; *see also* RCW 71.09.025. When the petition is filed, a judge must determine ex parte if "probable cause exists to believe that the person named in the petition is a sexually violent predator". RCW 71.09.040. When probable cause is found, the person is taken into custody and transferred to a facility for evaluation, pursuant to rules developed by the Department of Social and Health Services (DSHS). Within 45 days, the court shall conduct a trial to determine if the person is a sexually violent predator. RCW 71.09.050. Either party, or the court, may demand a jury trial.

The detainee has a statutory right to counsel. In addition, the detainee may be examined by a qualified expert

of his or her choice. Both services will be provided if the person is indigent. RCW 71.09.050. The burden is on the State to prove, beyond a reasonable doubt, that the detainee is a sexually violent predator. RCW 71.09.060(1). If so, then he or she shall be committed to a facility "for control, care, and treatment" until "safe to be at large". RCW 71.09.060(1). The Statute limits treatment centers to mental health facilities located within correctional institutions. RCW 71.09.060(3); RCW 10.77.220.

The detainee must be examined annually to determine his or her mental condition, and the results must be provided to the trial court. RCW 71.09.070. In addition, the person may obtain an additional examination at state expense, if necessary. RCW 71.09.070. If it appears that the person is no longer a sexually violent predator then the secretary of DSHS shall authorize the detainee to petition the court for release. RCW 71.09.090. When such a petition is filed, the court must order a hearing within 45 days. At the hearing, a jury may be demanded by either party, and the burden is on the State to prove, beyond a reasonable doubt, that the detainee is not safe to be at large. RCW 71.09.090(1).

A detainee may also petition the court directly without the approval of the secretary. RCW 71.09.090(2). Upon filing such a petition, a show cause hearing is held, at which time the petitioner has the right to be represented by appointed counsel, but not the right to be present. If the court finds probable cause that the detainee is no longer dangerous, then a full hearing is held with the same procedures as above. The court will not hold any further hearings unless the detainee can show a change of circumstances. RCW 71.09.100.

2. Andre Brigham Young.

The petition in Andre Brigham Young's case was filed on October 24, 1990, 1 day prior to his release from prison for his most recent rape conviction. The certification for determination of probable cause (certificate) references

two psychological evaluations of Young and describes his criminal history, which includes six violent felony rapes of adult female strangers. These rapes, which the record suggests may be only a partial accounting of Young's sexual assaults, occurred over the past 31 years during the intermittent periods when Young was not in custody.

Young's first series of known rapes occurred in the fall of 1962, when he broke into the respective homes of four different women, forcing them to engage in sexual intercourse. On at least two of these occasions, Young threatened his victims with a knife. In another incident, he raped a young mother with a 5-week old infant nearby. Young was convicted in October 1963 on four counts of first degree rape, with two deadly weapon findings.

Less than a year later, while free on an appeal bond for his 1963 convictions, Young entered the home of another woman. With her child present, he exposed himself, threatened to hurt the child, and threatened to rape and kill the woman. Fortunately, he was frightened away. Young was charged with attempted rape, but was never tried for this offense because he was found incompetent.

Young was released on parole in January of 1972. After roughly 5 years of freedom, Young was again convicted of rape. As with the previously known offenses, he raped this woman after illegally entering her home in the early morning hours. Young pleaded guilty to third degree rape.

He was released from prison in 1980. In 1985, he raped another woman, again forcing his way into her apartment. Three small children were present. Young was convicted of first degree rape.

After reviewing the petition and supporting certificate, Judge Johnson issued an ex parte order which found probable cause, and directed the clerk to issue a no-bail arrest warrant and to transfer Young to the Special

Commitment Center at Monroe. Following Young's detention at Monroe, counsel for Young brought motions seeking transportation back to King County, a probable cause hearing to challenge the ex parte ruling, and bail -- all of which were denied by Judge Johnson. On November 14, 1990, over Young's assertion of a right to remain silent, Judge Johnson ordered him to participate in psychiatric evaluations. Young refused to participate in the evaluations. A pretrial hearing was held in mid-January where the Superior Court rejected constitutional challenges to the Statute. Young was not allowed to attend this hearing.

Trial began on February 12, 1991, in front of Judge Bever. Both sides presented testimony by expert witnesses. Young called Dr. Nancy M. Steele, a psychologist who works with sex offenders in Minnesota. She testified that there is no particular mental disorder that makes a person likely to re- offend. In addition, Dr. G. Christian Harris testified that rape is a behavior, not a diagnostic category, and that he could not accurately predict that any particular person would re-offend. Young also called Dr. Fred Wise, who questioned the legitimacy of the diagnostic impressions made by the State's expert witness.

The State called Dr. Irwin Dreiblatt, a licensed clinical psychologist who has evaluated some 1,400 sexual offenders and treated approximately 700 in his 25 years of practice. Based upon a records review, Dr. Dreiblatt testified to a reasonable psychological certainty that it was his diagnostic impression that Young suffered from: (1) a severe personality disorder not otherwise specified, with primarily paranoid and anti-social features, (2) a severe paraphilia, which would be classified as either paraphilia sexual sadism or paraphilia not otherwise specified (rape). Dr. Dreiblatt stated that the severe paraphilia constituted a "mental abnormality" under the sex predator commitment Statute. Dr. Dreiblatt further concluded that the severe paraphilia -- in combination with the personality disorder, the length of time

spanning Young's crimes, his recidivism record, his use of weapons, his persistent denial of the crimes and his lack of empathy or remorse for his victims -- made it more likely than not that Young "would commit further sexually violent acts." Report of Proceedings Young (RPY) (Feb. 27, 1991), at 166.

The victims of Young's previous rape convictions testified regarding the circumstances of their assaults. Evidence was introduced pertaining to a 1972 conviction for a bomb threat. Defense motions for jury instructions regarding the presumption of innocence, the appropriate inference from Young's failure to testify, and others were denied by the court. At the request of the State, the jury was instructed that a unanimous verdict was required. On March 8, the jury concluded that Young was a "sexually violent predator".

3. Vance Russell Cunningham.

The petition in Vance Russell Cunningham's case was filed on December 21, 1990, about 4 ½ months after Cunningham had completed his most recent prison sentence for rape. As with Young, the certificate for determination of probable cause references two psychological evaluations of Cunningham and describes his extensive history of sexual crimes. Although Cunningham was only 26 when the petition was filed, his criminal history spans the prior 10 years and includes three convictions for raping adult female strangers.

Cunningham's first felony occurred in 1980 when he was 15 years old. A woman was walking through a Seattle-area park with her three young children, when Cunningham, armed with a knife, jumped out of some bushes and commanded, "nobody move". After the woman screamed, Cunningham fled. When he was apprehended, Cunningham confessed to the assault and admitted that his purpose was to force the woman to commit oral sex upon

him. For this juvenile assault, he received a short sentence and some unspecified counseling.

In 1984, Cunningham raped a woman hitchhiker to whom he had offered a ride. Cunningham threatened to kill his victim, struck her several times, forced her to the ground, and then raped her. Cunningham pleaded guilty to second degree rape, and was sentenced to 31 months in prison.

Only 3 months after his release in November 1986, Cunningham committed his next rape. He grabbed the victim around the throat, and then forced her to have anal intercourse with him. Two months later, in April 1987, Cunningham assaulted another woman in a similar manner, forcing her to engage in additional acts of intercourse. For these actions, a jury found him guilty on two counts of second degree rape.

In an ex parte proceeding, after reviewing the petition and supporting affidavit, Judge Johnson found probable cause and ordered the clerk to issue a no-bail arrest warrant, and transfer Cunningham to the Special Commitment Center at Monroe. Judge Johnson also ruled that Cunningham "has no blanket Fifth Amendment privilege to refuse to answer any and all questions" put to him during the evaluation. Clerk's Papers, at 1183. On January 2, defense counsel brought motions to vacate the ex parte order and to allow Cunningham's participation in pretrial proceedings. The motions were denied. Cunningham was allowed to be present at his March 15, 1991, pretrial hearing.

Following jury selection, trial commenced on May 21, 1991, in front of Judge McCullough. The jury heard extensive testimony from expert witnesses for both sides. Cunningham called Dr. Steele to testify on his behalf. Based upon a records review, Dr. Steele stated that Cunningham was not suffering from a mental abnormality which would make him dangerous to women.

The State's expert was Dr. Leslie Rawlings, a licensed clinical psychologist who specializes in the assessment and treatment of sexual offenders. After reviewing Cunningham's records, Dr. Rawlings stated his diagnostic impression to a reasonable psychological certainty that Cunningham suffered from a severe paraphilia, not otherwise specified (rape). Dr. Rawlings further testified that paraphilia qualifies as a "mental abnormality" under the sex predator commitment Statute. Citing the paraphilia and several other factors, Dr. Rawlings concluded that "[i]t's my professional opinion that Mr. Cunningham is more likely than not to engage in predatory acts of sexual violence if out in the community". Report of Proceedings Cunningham (RPC) (May 21, 1991), at 39.

The jury also heard testimony from the victims involved in Cunningham's previous rape convictions. Cunningham testified on his own behalf. Over defense objections, the jury was instructed that a unanimous verdict was not required. On May 31, 1991, the jury returned an 11-to-1 verdict which found Cunningham to be a "sexually violent predator".

Both Young and Cunningham brought personal restraint petitions and motions for immediate release, which were heard by this court in January 1991. The motions for release were denied, and the court accepted jurisdiction over the petitions. The petitions were consolidated with the direct appeals from the trials.

II

EX POST FACTO LAW AND DOUBLE JEOPARDY

Petitioners argue that the Statute is unconstitutional, because it violates the double jeopardy clause and the prohibition against ex post facto laws. Generally, these clauses apply to criminal matters. Thus, if the Statute is civil rather than criminal in nature, the Statute survives this challenge. We conclude that the Statute is civil, and hold

that it does not violate either double jeopardy or the ex post facto clause.

The categorization of a particular statute as civil or criminal is largely a matter of statutory construction. *Allen v. Illinois*, 478 U.S. 364, 368, 106 S. Ct. 2988, 2991, 92 L. Ed. 2d 296 (1986); *United States v. Ward*, 448 U.S. 242, 248, 100 S. Ct. 2636, 2641, 65 L. Ed. 2d 742 (1980). The Supreme Court has adopted a 2-part analysis:

> First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.

(Citations omitted.) *Ward*, 448 U.S. at 248-49, 100 S. Ct. at 2641. Thus, we look first to the language of the Statute and the legislative history, then turn to an analysis of the purpose and effect of the statutory scheme.

Both the language of the Statute and the legislative history evidence a clear intent to create a civil scheme. The section of the law as enacted by the Legislature is entitled "Civil Commitment", Laws of 1990, ch. 3, part X, and is codified at RCW Title 71, Mental Illness.[1] Persons committed are placed in the custody of the DSHS and housed at a DSHS treatment facility. RCW 71.09.060(1); WAC 275-155. The Department of Corrections has no role in caring for committed sex predators. In addition, the provisions at issue here are compared in the text of the

[1]The title "Civil Commitment" is not properly a part of the law. Laws of 1990, ch. 3, § 1404. However, it provides evidence of the legislative intent to treat this Statute as civil.

Statute to RCW 71.05, the civil involuntary commitment act. RCW 71.09.010.

An examination of the Act's legislative history further supports a civil intent. The Legislature's final report refers to the section as "Civil Commitment", and reports that "[a] new civil commitment procedure is created for 'sexually violent predators.'" 1990 *Final Legislative Report*, 2nd SSB 6259, at 144. Moreover, the Legislature enacted a bill substantially similar to that proposed by the Governor's Task Force on Community Protection. In its report, the Task Force quite plainly recommended a civil law, because neither the criminal system nor the existing civil system could accommodate the special needs of sex predators. Report, at II-20 to II-23. In light of the Statute's language and legislative history, then, it is clear that the Legislature intended a civil statutory scheme.

This does not end our inquiry, however. We next consider whether the actual impact of the Statute is civil or criminal:

> [T]he civil label is not always dispositive. *Where a defendant has provided "the clearest proof"* that "the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention" that the proceeding be civil, it must be considered criminal . . ..

(Italics ours.) *Allen*, 478 U.S. at 369, 106 S. Ct. at 2992 (quoting *Ward*, 448 U.S. at 248-49, 100 S. Ct. at 2641-42). In performing this inquiry, we take particular notice of the high level of proof petitioners must satisfy in order to overcome the presumption favoring the Legislature's civil designation. *Allen*, 478 U.S. at 369, 106 S. Ct. at 2992.

In *Allen*, a Fifth Amendment self-incrimination case, the Supreme Court held that an Illinois statute which provided for civil commitment of sexually dangerous persons

was properly categorized as civil, not criminal. *Allen*, at 369, 106 S. Ct. at 2992. Under the Illinois statute, a "sexually dangerous person" was one who suffered from "a mental disorder . . . coupled with criminal propensities to the commission of sex offenses". *Allen*, 478 U.S. at 366 n.1, 106 S. Ct. at 2990 n.1. In holding the statute civil, the Court found several factors significant: the Illinois Supreme Court had determined that the statute was civil in nature; the State had a statutory obligation to provide care and treatment designed to effect recovery for those committed; detainees were discharged when no longer dangerous; and, conditional release was also available. *Allen*, at 369, 106 S. Ct. at 2992. The Court summarized:

> In short, the State has disavowed any interest in punishment, provided for the treatment of those it commits, and established a system under which committed persons may be released after the briefest time in confinement.

Allen, at 370, 106 S. Ct. at 2992.

The provisions of our sexually violent predator Statute are remarkably similar to those of the Illinois statute upheld in Allen. Most notably, the Statute's definition of "sexually violent predator" is almost identical to Illinois' definition of "sexually dangerous person" -- both require a mental disorder which leads to the commission of violent sex offenses. *Compare* RCW 71.09.020(1) *with* Ill. Ann. Stat. ch. 38, ¶ 105-1.01 (Smith-Hurd 1980). Similarly, both the Illinois statute and RCW 71.09 require care and treatment for the committed individual, and provide this care in a psychiatric facility. *Compare* RCW 71.09.060(1) *and* RCW 71.09.080 *with* Ill. Ann. Stat. ch. 38, ¶ 105-8 (Smith-Hurd 1980). In addition, under both schemes, committed persons must be released as soon as they are no longer dangerous. *Compare* RCW 71.09.090(1) *with* Ill. Ann. Stat. ch. 38, ¶ 105-9 (Smith-Hurd 1980).

Petitioners argue that the Court's holding in *Allen* is distinguishable because the Illinois statute provides for commitment in lieu of serving a criminal sentence. While this is a distinguishing factor, it is by no means a contradictory one. That the State of Illinois chose to forego criminal liability for the offender's initial actions does not require Washington to do so. *See, e.g., Bailey v. Gardebring*, 940 F.2d 1150 (8th Cir. 1991) (constitutional to both civilly commit and imprison sexually dangerous individual), *cert. denied*, 503 U.S. 952, 112 S. Ct. 1516, 117 L. Ed. 2d 652 (1992). As we discuss below, the goals of civil and criminal confinement are quite different; the former is concerned with incapacitation and treatment, while the latter is directed to retribution and deterrence. The sexually violent predator Statute is not concerned with the criminal culpability of petitioners' past actions. Instead, it is focused on treating petitioners for a current mental abnormality, and protecting society from the sexually violent acts associated with that abnormality.

Additional guidance for the determination of whether a statute is criminal was set forth by the Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 567-68, 9 L. Ed. 2d 644 (1963). The court should consider:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . ..

(Footnotes omitted.) These factors weigh heavily on the side of a finding that this Statute is civil. Although the scheme here does involve an affirmative restraint, the civil commitment goals of incapacitation and treatment are distinct from punishment, and have been so regarded historically. Moreover, no finding of scienter is required to commit an individual who is a sexually violent predator; the determination is made based on a mental abnormality or personality disorder rather than on one's culpability. Furthermore, the Statute is necessary to serve the legitimate and vital purpose of protecting innocent potential victims.[2]

Finally, we also inquire into the purposes of the legislation. Our construction of the Statute should be that which best advances the legislative purpose. *Wichert v. Cardwell*, 117 Wn.2d 148, 151, 812 P.2d 858 (1991). The Statute promotes civil ends rather than criminal ones. The Statute before us is primarily concerned with incapacitation and treatment. Incapacitation has often been recognized as a legitimate civil goal. *See Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). Treatment is also a proper aim of civil legislation. As one commentator has remarked:

> the Sexually Violent Predator civil commitment scheme is not a method of punishment. Washington is undertaking to treat the offender pursuant to its parens patriae power and to protect the public "from the dangerous tendencies of some who are

[2]The mere fact that the State chose to establish a special commitment procedure for sex predators has no bearing on the question of whether the law is civil or criminal. As the Supreme Court stated in *Allen*, "[t]hat the State has chosen not to apply the Act to the larger class of mentally ill persons who might be found sexually dangerous does not somehow transform a civil proceeding into a criminal one". *Allen*, 478 U.S. at 370, 106 S. Ct. at 2993.

> mentally ill" pursuant to the state's police power.

Marie A. Bochnewich, Comment, *Prediction of Dangerousness and Washington's Sexually Violent Predator Statute*, 29 Cal. W. L. Rev. 277, 278 (1992).

In contrast, the Supreme Court has said repeatedly that retribution and deterrence are punitive, and thus are the goals of criminal law. *United States v. Halper*, 490 U.S. 435, 448, 109 S. Ct. 1892, 1901-02, 104 L. Ed. 2d 487 (1989); *Mendoza-Martinez*, 372 U.S. at 168, 83 S. Ct. at 567-68; *Bell v. Wolfish*, 441 U.S. 520, 539 n.20, 99 S. Ct. 1861, 1874 n.20, 60 L. Ed. 2d 447 (1979). Thus, the Court reasoned:

> a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

Halper, at 448, 109 S. Ct. at 1902; *accord Austin v. United States*, 509 U.S. 602, 608-613, 113 S. Ct. 2801, 2805-07, 125 L. Ed. 2d 488 (1993). This court has applied similar reasoning:

> [T]he determinative factors for resolving a double jeopardy claim are whether [the sanction] has a rational connection to some purpose other than retribution or deterrence, and whether the sanction appears excessive in relation to the alternative purpose.

O'Day v. King Cy., 109 Wn.2d 796, 817, 749 P.2d 142 (1988), (citing *Mendoza-Martinez*, 372 U.S. at 168-69, 83 S. Ct. at 567-68). Absent any indication that a criminal purpose was intended, or actually served by the statute, the stated civil goals of the Legislature are controlling. *See Mendoza-Martinez*, 372 U.S. at 168-69, 83 S. Ct. at 567-68.

In sum, we conclude that the sexually violent predator Statute is civil, not criminal, in nature. The language and history of the Statute so indicate, as do its purposes and effect. Petitioners have failed "to provide the clearest proof" to the contrary.

Turning to the specific challenges made here, petitioners argue that RCW 71.09 violates the ex post facto clause. The prohibition against ex post facto laws is expressly leveled against states in U.S. Const. art. 1, § 10.

> A law violates the ex post facto prohibition if it aggravates a crime or makes it greater than it was when committed; permits imposition of a different or more severe punishment than was permissible when the crime was committed; or, changes the legal rules to permit less or different testimony to convict the offender than was required when the crime was committed.

State v. Edwards, 104 Wn.2d 63, 70-71, 701 P.2d 508 (1985) (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798)). The purposes of the prohibition are to give individuals fair warning of the effect of legislative acts, and to restrict the power of the State to impose arbitrary or vindictive legislation. *Weaver v. Graham*, 450 U.S. 24, 28-29, 101 S. Ct. 960, 963-65, 67 L. Ed. 2d 17 (1981).

The ex post facto clause has been interpreted to apply only to criminal matters. *Calder v. Bull*, *supra*; *see* William W. Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. Chi. L. Rev. 539 (1946-1947), *cited in* 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 2.4 n.9 (1986). In addition, at least one court has held that sexual psychopath proceedings did not involve the ex post facto prohibition because it was not a criminal remedy. *State ex rel. Sweezer v. Green*, 360 Mo. 1249, 1253, 232 S.W.2d 897, 24 A.L.R.2d

340 (1950). Because the Statute is civil, therefore, the ex post facto prohibition does not apply.

Petitioners argue further that the prohibition against double jeopardy is violated by the Act. The Fifth Amendment provides, in part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb". The double jeopardy clause prohibits multiple punishment for the same offense. *Halper*, 490 U.S. at 440, 109 S. Ct. at 1897; *O'Day*, 109 Wn.2d at 816, 749 P.2d 142. This prohibition "has deep roots in our history and jurisprudence." *Halper*, at 440, 109 S. Ct. at 1897.

In general, the prohibition against double jeopardy applies only to criminal measures:

> "[a] double jeopardy violation does not occur simply because two adverse consequences stem from the same act." *In re Mayner*, [107 Wn.2d 512, 730 P.2d 1321 (1986)] at 521. Double jeopardy does not apply "unless the sanction sought to be imposed in the second proceeding is punitive in nature so that the proceeding is essentially criminal." *Beckett v. Department of Social & Health Servs.*, 87 Wn.2d 184, 188, 550 P.2d 529 (1976) [*overruled on other grounds by Dunner v. McLaughlin*, 100 Wn.2d 832, 676 P.2d 444 (1984)]; *see Emory v. Texas Bd. of Med. Examiners*, 748 F.2d 1023, 1026 (5th Cir. 1984).

O'Day, 109 Wn.2d at 816-17, 749 P.2d 142. The prohibition has, however, been found to be implicated in some circumstances by "civil" penalties as well as "criminal". In *Halper*, the Supreme Court found that a civil fine imposed in a Medicare fraud case after a criminal sentence had been served violated double jeopardy. *Halper*, at 452, 109 S. Ct. at 1903-04. The Supreme Court focused on whether the sanction was remedial or punitive in nature, noting that the

purpose actually served by the sanction, rather than the underlying nature of the proceeding, determined the issue. *Halper*, at 447 n.7, 109 S. Ct. at 1901 n.7. The court held that a "civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." *Halper*, at 448, 109 S. Ct. at 1901-02.

Here, as noted above, the statutory scheme has not been shown to serve any punitive goal; indeed, it does not. Moreover, in *Halper*, the Court inquired as to the remedial function of the civil penalties, and questioned if the Government could impose a monetary penalty after a criminal sentence had been exacted. Essentially, *Halper* ruled that the State may not bring a separate civil action based on criminal conduct that is not rationally related to a legitimate civil goal. *Halper*, at 449, 109 S. Ct. at 1902. Incapacitation and treatment, though, are legitimate civil goals, as evidenced by the ordinary civil commitment law. *See Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). Therefore, enforcement of the Act does not violate double jeopardy.

III

SUBSTANTIVE DUE PROCESS

Petitioners argue that substantive constitutional requirements are violated by the Statute, and that it should be overturned. The propriety of the statutory scheme here is a matter of first impression. Although somewhat different from our sex predator Statute, the United States Supreme Court has upheld statutory schemes where sexual offenders were committed in lieu of serving their criminal sentences. Until 1984, and the passage of sentencing reform, Washington utilized such a scheme. Former RCW 71.06. In *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 60 S. Ct. 523, 84 L. Ed. 744, 126 A.L.R. 530 (1940), the Court refused to invalidate a "psychopathic personality" proceeding. As noted earlier, the Court has upheld

confinement under the Illinois Sexually Dangerous Persons Act. *Allen v. Illinois*, 478 U.S. 364, 374, 106 S. Ct. 2988, 2994-95, 92 L. Ed. 2d 296 (1986).

In their substantive challenges to the Statute, petitioners argue that it does not serve a valid state purpose. They further argue that the Statute violates due process because petitioners are not mentally ill and that constitutionally required treatment is precluded due to the conditions of confinement. As such, they argue that the Statute authorizes unconstitutional preventive detention. Finally, petitioners argue that evidence of a recent overt act which proves dangerousness is mandated. Although we agree that evidence of an overt act may be required in *limited* circumstances, we conclude that there are no substantive constitutional impediments to the sexually violent predator scheme.

1. Strict Scrutiny.

The constitution requires that a person shall not be deprived of life, liberty, or property without due process of law. U.S. Const. amends. 5, 14; Const. art. 1, § 3. An individual's liberty interest is important and fundamental. *United States v. Salerno*, 481 U.S. 739, 750, 107 S. Ct. 2095, 2103, 95 L. Ed. 2d 697 (1987). When a state's laws impinge on fundamental rights, such as liberty, they are constitutional only if they further compelling state interests, and are narrowly drawn to serve those interests. *State v. Farmer*, 116 Wn.2d 414, 429, 805 P.2d 200, 812 P.2d 858 (1991); *In re Schuoler*, 106 Wn.2d 500, 508, 723 P.2d 1103 (1986).

Applying the strict scrutiny test to the Statute as a whole, it is irrefutable that the State has a compelling interest both in treating sex predators and protecting society from their actions. *Addington v. Texas*, 441 U.S. 418, 426, 99 S. Ct. 1804, 1809-10, 60 L. Ed. 2d 323 (1979); *Vitek v. Jones*, 445 U.S. 480, 495, 100 S. Ct. 1254, 1264-65, 63 L. Ed. 2d 552 (1980). The Supreme Court has stated that:

> The state has a legitimate interest under its parens patriae powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.

Addington, 441 U.S. at 426, 99 S. Ct. at 1809; *see also Salerno*, 481 U.S. at 748-49, 107 S. Ct. at 2102 ("the government may detain mentally unstable individuals who present a danger to the public"). Here, petitioners Young and Cunningham were diagnosed with a mental disorder and share a lengthy criminal history of violent rape. Other individuals encompassed under the commitment law share similar profiles. In such circumstances, the Court has consistently upheld civil commitment schemes. *See Addington v. Texas*, *supra*; John Q. La Fond, *An Examination of the Purposes of Involuntary Civil Commitment*, 30 Buff. L. Rev. 499, 513 (1981).

Any criticism of the Statute, then, would have to be based on the requirement that it be narrowly drawn. We will address petitioners' various "least restrictive alternative" arguments in subsequent sections of this opinion.

2. Mentally Ill and Dangerous.

Petitioners argue that the Statute allows the State to hold individuals without proving that the person is both mentally ill and dangerous. In *Addington*, the Supreme Court held that a person must be both mentally ill[3] and dangerous

[3]Although the Supreme Court in *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) used the term "mentally ill" almost exclusively, the Court has always used the term "mentally ill" interchangeably with "mentally disordered". *See, e.g., Allen v. Illinois* (478 U.S. 364, 106 S. Ct. 2988) (upholding an Illinois statute requiring both a "mental disorder" and dangerousness); *Addington v. Texas* (441 U.S. 418, 99 S. Ct. 1804) (using both terms). Indeed, the terms are largely synonymous. *Longman Dictionary of Psychology and Psychiatry* 451 (1984).

for a civil commitment to be permissible under the due process clause of the constitution. *Accord, e.g., Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). The sexually violent predator Statute satisfies this due process standard.

The Statute clearly requires proof of a "mental abnormality or personality disorder" for civil commitment. RCW 71.09.020(1). Although "mental abnormality" is not defined in the American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (3d rev. ed. 1987) (*DSM-III-R*),[4] the Legislature has given it a meaning which incorporates a number of recognized mental pathologies:

> In using the concept of "mental abnormality" the legislature has invoked a more generalized terminology that can cover a much larger variety of disorders. Some, such as the paraphilias, are covered in the *DSM-III-R*; others are not. The fact that pathologically driven rape, for example, is not yet listed in the *DSM-III-R* does not invalidate such a diagnosis. The *DSM* is, after all, an evolving and imperfect document. Nor is it sacrosanct. Furthermore, it is in some areas a political document whose diagnoses are based, in some cases, on what American Psychiatric Association ("APA") leaders consider to be practical realities. *What is critical for our purposes is that psychiatric and psychological*

[4]The *DSM-III-R* is a document frequently relied upon by courts in determining the acceptance of psychiatric diagnosis. *E.g., Heller v. Doe*, 509 U.S. 312, 318-324, 113 S. Ct. 2637, 2642-44, 125 L. Ed. 2d 257 (1993); *State v. Hutsell*, 120 Wn.2d 913, 917, 845 P.2d 1325 (1993); *In re Rice*, 118 Wn.2d 876, 890-91, 828 P.2d 1086, *cert. denied*, 506 U.S. 958, 113 S. Ct. 421, 121 L. Ed. 2d 344 (1992).

> *clinicians who testify in good faith as to mental abnormality are able to identify sexual pathologies that are as real and meaningful as other pathologies already listed in the DSM.*

(Italics ours.) Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. Puget Sound L. Rev. 709, 733 (1992). In both Young's and Cunningham's respective trials, expert witnesses for petitioners and the State were competent and able to offer testimony on the mental pathologies underlying the sex predator condition. These same experts testified that the statutory term "mental abnormality" was nearly identical to the notion of "mental disorder" as defined in the *DSM-III-R*.[5]

Both Young and Cunningham were primarily diagnosed with a mental disorder known as "paraphilia". Classified as a sexual disorder, the essential features of a paraphilic mental illness are "recurrent intense sexual urges and sexually arousing fantasies generally involving either (1) nonhuman objects, (2) the suffering or humiliation of oneself or one's partner (not merely simulated), or (3) children or other nonconsenting persons". *DSM- III-R*, at 279. The *DSM-III-R* contains an extensive discussion of paraphilia; none of the experts at Young's and Cunningham's commitment trials challenged the acceptance of this diagnostic category.

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[5]Despite the testimony at trial, petitioners suggest that a "mental abnormality" is not a true mental illness because it is a term coined by the Legislature, rather than the psychiatric and psychological community. This argument is meritless. Over the years, the law has developed many specialized terms to describe mental health concepts. For example, the legal definitions of "insanity" and "commitment" vary substantially from their psychological and psychiatric counterparts. The *DSM-III-R* explicitly recognizes this fact, noting that the scientific categorization of a mental disorder may not be "wholly relevant to legal judgments". *DSM-III-R*, at xxix.

The specific diagnosis offered by the State's experts at each commitment trial was "paraphilia not otherwise specified." This is a residual category in the *DSM-III-R* which encompasses both less commonly encountered paraphilias and those not yet sufficiently described to merit formal inclusion in the *DSM-III-R*. *DSM-III-R*, at 280. As the testimony reflected, paraphilias are classified as either mild, moderate or severe. Young and Cunningham were both diagnosed with a severe paraphilia; i.e. "[t]he person has repeatedly acted on the paraphilic urge". *DSM-III-R*, at 281.

The expert testimony further reflected that both Young and Cunningham could be classified within the "paraphilia not otherwise specified" category as suffering from "rape as paraphilia". According to the seminal article on this mental disorder, portions of which were read into testimony at both trials, certain patterns of rape fall into this diagnosis:

> Clinical interviews of rapists, however, provide support for the classification of rape as a paraphilia, because many individuals report having recurrent, repetitive, and compulsive urges and fantasies to commit rapes. These offenders attempt to control their urges, but the urges eventually become so strong that they act upon them, commit rapes, and then feel guilty afterwards with a temporary reduction of urges, only to have the cycle repeat again. This cycle of ongoing urges, attempts to control them, breakdown of those attempts, and recurrence of the sex crime is similar to the clinical picture presented by exhibitionists, voyeurs, pedophiles, and other traditionally recognized categories of paraphiliacs.

Gene G. Abel & Joanne-L. Rouleau, *The Nature and Extent of Sexual Assault, in Handbook of Sexual Assault: Issues,*

Theories and Treatment of the Offender 9, 18 (W.L. Marshall, et al. eds., 1990) (hereinafter *Handbook of Sexual Assault*).[6] The article goes on to state that "[s]uch a categorization raises the issue of the offender's need for psychiatric and psychological treatment before he can gain control over his sexual assaultiveness". *Handbook of Sexual Assault*, at 20. It recognizes that "[i]n our culture, this has meant that not only must the individual so categorized serve his time for his illegal act of sexual assault, but he must also serve time receiving psychiatric and psychological treatment for his paraphilia". *Handbook of Sexual Assault*, at 20.

In Young's trial, the State's expert testified that Young also suffered from an "anti-social personality disorder". Like paraphilia, anti-social personality disorder is classified as a mental disorder in the *DSM-III-R*. In general, a personality disorder diagnosis is appropriate "only when *personality traits* are inflexible and maladaptive and cause either significant functional impairment or subjective distress". *DSM-III-R*, at 335. Anti-social personality disorder is characterized by a long-term pattern of irresponsible and anti-social behavior. *DSM-III-R*, at 342.

Petitioners nonetheless argue that the Statute does not address a mental disorder because treatment of sex offenders is impossible. Indeed, the Legislature adopted specific findings that "sexually violent predators . . . have antisocial personality features which are unamenable to existing mental illness treatment", and that "the prognosis for curing sexually

[6]According to the expert testimony, rape as paraphilia falls within the *DSM-III-R* category of "paraphilia, not otherwise specified". CPY (Feb. 27, 1991), at 132. Dr. Steele, an expert for petitioners who testified at both trials, agreed that rape is a paraphilia. CPY (Mar. 1, 1991), at 148; CPC (May 23, 1991), at 66. The article by Doctors Abel and Rouleau reviews the pertinent scientific literature and concludes that "[t]he weight of scientific evidence, therefore, supports rape of adults as a specific category of paraphilia". *Handbook of Sexual Assault*, at 19. Moreover, the *DSM-III-R* specifies violent rape as a symptom of "paraphilia sexual sadism". *DSM-III-R*, at 287-88.

violent offenders is poor". RCW 71.09.010. Moreover, as argued by amicus, it is commonly believed that violent sex offenders cannot be successfully treated, especially involuntarily. Brief of Amicus Curiae Washington State Psychiatric Association, at 10; *see also ABA Criminal Justice Mental Health Standards*, at 7-8.1 n.16 (1989).

There are two flaws in this line of argument. First, the mere fact that an illness is difficult to treat does not mean that it is not an illness.[7] For example, some forms of schizophrenia cannot be treated, but the diagnosis nonetheless remains a valid one. The Legislature should not be admonished for its honest recognition of the difficulties inherent in treating those afflicted with the mental abnormalities causing the sex predator condition.

Second, petitioners have failed to show that the *specific* conditions of confinement are incompatible with treatment. As the Supreme Court noted in *Allen*:

> Petitioner has not demonstrated, and the record does not suggest, that "sexually dangerous persons" in Illinois are confined under conditions incompatible with the State's asserted interest in treatment. Had petitioner shown, for example, that the confinement of such persons imposes on them a regimen with is essentially identical to that imposed upon felons with no need for psychiatric care, this might well be a different case.

Allen, 478 U.S. at 373, 106 S. Ct. at 2994. Similarly, the Washington Statute provides for treatment, and petitioners

[7]It is by no means clear that the mental abnormalities and personality disorders underlying the sex predator condition are "untreatable". Of the experts who testified at trial, many reported that a significant portion of their practices were devoted to treating sex offenders. Also, the *Handbook of Sexual Assault* contains six chapters discussing the treatment of sex offenders. *See Handbook of Sexual Assault*, at 279-382.

have failed to prove that this goal cannot be effectuated under the Statute's terms.

Due process concerns are similarly satisfied because the sexually violent predator Statute requires dangerousness as a condition for civil commitment. RCW 71.09.020(1). The Court has said that mental illness is insufficient, standing alone, to justify confinement. *O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 2493-94, 45 L. Ed. 2d 396 (1975). Instead, there must be a showing that the person is dangerous to the community. *O'Connor*, 422 U.S. at 582-83, 95 S. Ct. at 2497-98 (Burger, C.J., concurring). Similarly, this court has often said that "the only basis for involuntary commitment is dangerousness". *In re Patterson*, 90 Wn.2d 144, 153, 579 P.2d 1335 (1978), *overruled on other grounds by Dunner v. McLaughlin*, 100 Wn.2d 832, 676 P.2d 444 (1984); *In re Levias*, 83 Wn.2d 253, 257, 517 P.2d 588 (1973), *overruled on other grounds by Dunner v. McLaughlin*, 100 Wn.2d 832, 676 P.2d 444 (1984).

Here, the Statute inherently applies only to dangerous offenders. Under the very definitions of the Statute, only "sexually violent offenders" -- those "likely to engage in predatory acts of sexual violence" -- are subject to its provisions. RCW 71.09.020(1). Individuals involuntarily committed under the Statute possess a proven history of rape and sexually motivated violence. Their likelihood of re-offense is extremely high. According to supplemental authority submitted by petitioners themselves and specific to the sex predator program, "[u]sing theoretically relevant and empirically tested predictors, predictive accuracy [of sexual recidivism] can realistically be expected to be in the 80% range". Dr. Vernon Quinsey, *Review of the Washington State Special Commitment Center Program for Sexually Violent Predators*, at 9 (appended to Wash. State Inst. for Pub. Policy, *Review of Sexual Predator Program: Community Protection Research Project* (Feb. 1992)); *see also Heller v. Doe*, 509 U.S. 312, 323, 113 S. Ct. 2637, 2644 (1993)

("Previous instances of violent behavior are an important indicator of future violent tendencies.").[8] Thus, there is no doubt that commitment is predicated on dangerousness under the Statute.[9]

In short, the Statute satisfies the due process concerns outlined in *Addington v. Texas* (441 U.S. 418, 99 S. Ct. 1804). Expert testimony in both the Young and Cunningham trials diagnosed petitioners with a mental disorder, and informed the jury of the dangerousness arising out of that disorder.[10]

3. Nature and Duration.

In a related issue, the Supreme Court has stated that due process "'requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.'" *Jones v. United States*, 463 U.S. 354, 368, 103 S. Ct. 3043, 3051, 77 L. Ed. 2d 694 (1983) (quoting *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S.

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[8]Although predictions of future dangerousness are certainly less than perfect, this court has previously decided that predictions of dangerousness do not violate due process. *In re Harris*, 98 Wn.2d 276, 280-81, 654 P.2d 109 (1982).

[9]The dissent seriously underplays the quantum of proof necessary to meet the dangerousness prong of the sex predator statute. The State must do far more than merely reprove a past criminal act, or present testimony from someone who thinks that individual is still dangerous. See dissent, at 62-65. Instead, the statute requires *proof beyond a reasonable doubt* that the person has been convicted or charged with a crime of sexual violence, and suffers from a mental abnormality or personality disorder "which makes the person likely to engage in predatory acts of sexual violence". RCW 71.09.020(1). In the current cases, testimony came from licensed mental health professionals familiar with petitioners' past conduct and current mental profiles.

[10]Citing a handful of law review articles, the dissent claims that RCW 71.09 is unrelated to any known mental illness. In making this claim, however, the dissent does not respond to the extensive expert testimony presented at both Young's and Cunningham's respective trials.

Ct. 1845, 1858, 32 L. Ed. 2d 435 (1972)). Thus, an inquiry into the purposes of the Statute is required.

Two underlying purposes for commitment are often advanced -- treatment and incapacitation. *See* La Fond, *supra*. The Statute at issue here serves both purposes. The Statute requires that constitutionally mandated care and treatment be provided, RCW 71.09.080, and charges DSHS with the responsibility of providing "control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large". RCW 71.09.060(1). DSHS has promulgated regulations to effect this purpose. An individualized treatment plan is developed and maintained for each person committed under the Statute, including:

> (a) A description of a person's specific treatment needs;
>
> (b) An outline of intermediate and long-range treatment goals, with a projected timetable for reaching the goals;
>
> (c) The treatment strategies for achieving the treatment goals;
>
> (d) A description of [sexual predator program] staff persons' responsibility; and
>
> (e) Criteria for recommending to the court whether a person should be released from the [sexual predator program].

WAC 275-155-040(1). The regulations governing the program make it clear that committed individuals shall "[r]eceive adequate care and individualized treatment". WAC 275-155-050(3)(a).

The purpose of incapacitation is also well served by this Statute. The task force responsible for drafting the legislation initially noted that an additional goal of the program was to "confine repeat violent offenders who

present an extreme safety risk". *Report*, at I-1. Sexually violent predators, those who are adjudged likely to engage in acts of violence, are housed in a special commitment center which must be located within a correctional institution. The record reflects that the current facility is rated maximum security. Given the nature of sexually violent predators, it would not be safe to house them in a less secure setting. Thus, it appears that the commitment is related to the purpose of the Statute.

Finally, petitioners argue that they are constitutionally entitled to the least restrictive alternatives to confinement available.[11] It is true that those who are civilly committed must be treated differently than criminals. The Supreme Court has said this explicitly:

> Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.

Youngberg v. Romeo, 457 U.S. 307, 321-22, 102 S. Ct. 2452, 2461, 73 L. Ed. 2d 28 (1982). Nevertheless, we need not place undue limitations on the administration of state institutions. *Romeo*, at 322, 102 S. Ct. at 2461-62.

In light of these considerations, giving the presumption of correctness to "decisions made by the appropriate professional" (here, DSHS), individuals who have been involuntarily committed have the right to "conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests". *Romeo*, at 324, 102 S. Ct. at 2462. Here, the dangerousness of committed sex predators justifies a secure confinement facility. Moreover,

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[11] A related argument is advanced that petitioners have a right to treatment. The Statute provides that any constitutional requirements concerning care and treatment must be met. RCW 71.09.080.

the regulations governing the commitment facility specifically provide a wider range of privileges than those associated with a prison setting:

> (3) A person the court commits to the SPP [sexual predator program] *shall*:
>
> (a) Receive adequate care and individualized treatment;
>
> (b) Be permitted to wear the committed person's own clothes and keep and use the person's personal possessions, except when deprivation of possessions is necessary for the person's protection and safety, the protection and safety of others, or the protection of property within the SPP;
>
> (c) Be permitted to accumulate and spend a reasonable amount of money in the person's SPP account;
>
> (d) Have access to reasonable personal storage space within SPP limitations;
>
> (e) Be permitted to have approved visitors within reasonable limitations;
>
> (f) Have reasonable access to a telephone to make and receive confidential calls within SPP limitations; and
>
> (g) Have reasonable access to letter writing material and to:
>
> (i) Receive and send correspondence through the mail within SPP limitations; and
>
> (ii) Send written communication regarding the fact of the person's commitment.

(Italics ours.) WAC 275-155-050.

There is no evidence in the record addressing either the actual conditions of confinement, or the quality of treatment. These issues are not currently before the court. Facially, the Statute and associated regulations suggest that the nature and duration of commitment is compatible with the purposes of the commitment.

4. *Foucha v. Louisiana.*

Petitioners next argue that the Supreme Court's recent decision in *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) forbids the civil commitment of sexually violent predators because it constitutes unconstitutional preventive detention. As is patently obvious, however, both the facts and the statute in *Foucha* differ significantly from those presented here. Contrary to petitioner's claim, our holding is consistent with and supportive of *Foucha*.

In *Foucha*, the Court overturned a Louisiana statute dealing with insanity acquittees because the release procedures were inadequate. The Court described the statute as follows:

> When a defendant in a criminal case pending in Louisiana is found not guilty by reason of insanity, he is committed to a psychiatric hospital unless he proves that he is not dangerous. This is so whether or not he is then insane. After commitment, if the acquittee or the superintendent begins release proceedings, a review panel at the hospital makes a written report on the patient's mental condition and whether he can be released without danger to himself or others. If release is recommended, the court must hold a hearing to determine dangerousness; the acquittee has the burden of proving that he is not dangerous. If found to be dangerous, the acquittee may be returned to the mental

> institution whether or not he is then mentally ill.

Foucha, 504 U.S. at 73, 112 S. Ct. at 1781-82. Four years after Terry Foucha had been committed, following an acquittal by reason of insanity of aggravated burglary and illegal discharge of a firearm, the superintendent of the facility where he was held recommended that he be released. The review panel reported that "there had been no evidence of mental illness since admission". *Foucha*, 504 U.S. at 74, 112 S. Ct. at 1782.

The trial court heard medical testimony that Foucha was probably in remission from what had been a temporary condition -- likely a drug induced psychosis. The court heard further testimony that Foucha had an "antisocial personality", that such condition was not a mental illness, and that he had no other mental disorders. However, an ultimate medical determination about his dangerousness could not be made. Instead, a doctor testified only that he could not "certify that [Foucha] would not constitute a menace to himself or others if released". *Foucha*, 504 U.S. at 74-75, 112 S. Ct. at 1782. Based solely on this equivocal testimony, the trial court returned him to the mental institution.

The United States Supreme Court reversed, holding that absent a determination of current mental illness and dangerousness, continued confinement under the Louisiana scheme was impermissible. *Foucha*, 504 U.S. at 85-86, 112 S. Ct. at 1788-89. The Court relied on three reasons to overturn the confinement and the underlying statute. First, the statute did not meet the minimal due process requirement "that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed." *Foucha*, 504 U.S. at 79, 112 S. Ct. at 1785. The State of Louisiana was continuing to confine Foucha in a psychiatric facility even though he was not suffering from a mental disease or illness. Second, the statute did not provide constitutionally adequate procedures. *Foucha*, 504 U.S. at

79, 112 S. Ct. at 1785. Finally, the Court determined that Foucha was not confined under any previously recognized authority of the State. It recognized three ways in which an individual could be confined: by the criminal justice system; pursuant to civil commitment law; or under the narrow circumstances set forth in *United States v. Salerno*, *supra*. *Foucha*, 504 U.S. at 80, 112 S. Ct. at 1785-86.

The Statute here withstands the scrutiny required in Foucha. As explained above, the sexually violent predator Statute is narrowly tailored to serve a compelling state interest. Also, before a person can be civilly committed, the State must prove that the individual is mentally ill[12] and dangerous -- a condition that was satisfied in Young's and Cunningham's respective trials. As such, the sexually violent predator commitment scheme falls squarely within *Foucha's* definition of constitutionally permissible civil commitment. *See Foucha*, 504 U.S. at 77-82, 112 S. Ct. at 1784-86. "The State may also confine a mentally ill person if it shows 'by

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[12]Petitioners raise the issue that, under *Foucha*, it is impermissible to civilly commit someone who has an "antisocial personality", because that condition is not a mental disorder. According to petitioners, the sex predator Statute violates this holding. This argument belies a careless reading of the *Foucha* facts. First, the condition in *Foucha* was an "antisocial personality". This condition falls within the *DSM-III-R* section entitled "V Codes for Conditions Not Attributable to a Mental Disorder" and is formally designated "antisocial behavior"; it is not a mental disorder. As such, anti-social behavior cannot form the basis for civil commitment. *Foucha v. Louisiana* (504 U.S. 71, 112 S. Ct. 1780). The sex predator Statute, however, requires proof of a "personality *disorder*" as one of the alternative means of commitment. (Italics ours.) RCW 71.09.020. Unlike "antisocial behavior", an "antisocial personality disorder" is a recognized mental disorder which is defined in the *DSM-III-R*, at 342. Second, petitioners ignore the limitations inherent in the Court's discussion of this issue. *Foucha* came before the Court on a limited trial record. As such, the Court pointed out several times that its discussion on the status of Foucha's condition as a mental illness was "according to the testimony given at the hearing in the trial court". *Foucha*, 504 U.S. at 79, 112 S. Ct. at 1785.

clear and convincing evidence that the individual is mentally ill and dangerous'". *Foucha*, 504 U.S. at 80, 112 S. Ct. at 1786 (quoting *Jones*, 463 U.S. at 362, 103 S. Ct. at 3048).

In addition, the sex predator Statute does not suffer from the procedural infirmities that rendered Louisiana's insanity acquittee scheme unconstitutional. Under the Washington law, the State must satisfy the highest burden of proof to civilly commit a sex predator. A higher burden of proof "tends to equalize the risks of an erroneous determination that the subject of a commitment proceeding has the condition in question". *Heller*, 509 U.S. at 322, 113 S. Ct. at 2644. Whereas Louisiana attempted to continue Foucha's confinement without claiming that he suffered from a mental illness, the Washington Statute makes proof of a *current* mental disorder a condition of commitment. Also, in regard to dangerousness, Louisiana placed the burden on Foucha, while the Washington Statute places the burden on the State. In contrast to the Louisiana statute, the sexually violent predator Statute is the type of "sharply focused scheme" which the Supreme Court called for in *Foucha*. 504 U.S. at 81, 112 S. Ct. at 1786.

Our interpretation of the holding in *Foucha* finds support in Justice O'Connor's crucial concurring opinion. In providing the necessary fifth vote which formed the majority, Justice O'Connor carefully pointed out the limitations of that holding:

> I write separately, however, to emphasize that the Court's opinion addresses only the specific statutory scheme before us, which broadly permits indefinite confinement of sane insanity acquittees in psychiatric facilities.

Foucha, 504 U.S. at 86-87, 112 S. Ct. at 1789 (O'Connor, J., concurring). Where the incapacitation is more closely tailored to "reflect pressing public safety concerns related to the acquittee's continuing dangerousness", continued

confinement may be permitted. *Foucha*, 504 U.S. at 87-88, 112 S. Ct. at 1789 (O'Connor, J., concurring).

The dissent claims that the sex predator program constitutes "preventative detention" because the statute is not "civil commitment" and sex predators are "detained" for an indefinite period of time. We reject this characterization. First, the sex predator statute does not rely upon the *Salerno* line of cases. It falls comfortably within the "civil commitment" category discussed in *Foucha* because the State must prove both a mental illness and dangerousness. Second, civil commitments are not subject to any rigid time limit. Rather, the commitment is tailored to the nature and duration of the mental illness. Finally, unlike pretrial detainees, those committed under the sex predator statute have been through a full trial with a complete range of procedural protections. In short, despite the dissent's protests to the contrary, the sex predator statute does not create any ominous "dangerousness court", but rather follows traditional civil commitment norms.

Even though petitioners potentially face a long period of civil commitment, the sexually violent predator Statute is wholly sustainable. Those committed under the sex predator Statute have been through a full trial with a complete range of procedural protections. From this trial, a jury has determined that the State has met the highest burden possible -- beyond a reasonable doubt -- in proving that the committed individual suffers from a mental abnormality which renders him a danger to the community. Although the period of confinement is not predetermined, the Statute's release provisions provide the opportunity for periodic review of the committed individual's current mental condition and continuing dangerousness to the community.

In sum, the circumstances of the *Foucha* case clearly dictated the result reached by the United States Supreme Court. The case before us deals with vastly different facts

and law, and is wholly consistent with the principles enunciated in *Foucha*.

5. Overt Act.

Petitioners next argue that the constitution requires evidence of a recent overt act to prove dangerousness, relying on *In re Harris*, 98 Wn.2d 276, 654 P.2d 109 (1982). Harris had been detained under RCW 71.05.150(1)(a), which provides for short-term detention for evaluation and treatment if "a person, as a result of a mental disorder, presents a likelihood of serious harm to others or himself". *Harris*, at 279, 654 P.2d 109. The phrase "likelihood of serious harm" is defined explicitly in RCW 71.05.020(3), as follows:

> (a) A substantial risk that physical harm will be inflicted by an individual upon his own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on one's self, (b) a substantial risk that physical harm will be inflicted by an individual upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm, or (c) a substantial risk that physical harm will be inflicted by an individual upon the property of others, as evidenced by behavior which has caused substantial loss or damage to the property of others[.]

The definition contains the inference that the harm at issue be evidenced by some act or behavior. The court noted that "such evidence must be recent to be meaningful". *Harris*, at 284, 654 P.2d 109. Thus, interpreting RCW 71.05, this court held that involuntary commitment was only permitted upon:

> a showing of a substantial risk of physical harm as evidenced by a recent overt act. This

> act may be one which has caused harm or creates a reasonable apprehension of dangerousness.

Harris, at 284-85, 654 P.2d 109.

However, the court rejected an additional requirement of "imminent danger", relying primarily on statutory interpretation. Harris, at 283-84, 654 P.2d 109. We compared the emergency detention provisions contained in RCW 71.05.150(2) -- which *do* require that the likelihood of serious harm be imminent, with the remaining procedures contained in RCW 71.05 -- which do *not* impose the condition of imminence. *Harris*, at 282, 654 P.2d 109. We concluded that the omission expressed the Legislature's intent not to impose the condition of imminence. *Harris*, at 282, 654 P.2d 109. In addition, the court noted:

> the practical effect of being placed in the hospital will usually eliminate the "imminence" of one's dangerousness. If we were to require "imminent danger" as a requirement of continued commitment, we would be creating a standard that (in many cases) would invalidate commitment as soon as it occurs. . . . A standard of "imminent danger" for all commitments would be impracticable.

Harris, at 284, 654 P.2d 109.

In many cases, sexually violent predators are incarcerated prior to commitment. *Cf. In re LaBelle*, 107 Wn.2d 196, 204, 728 P.2d 138 (1986). For incarcerated individuals, a requirement of a recent overt act under the Statute would create a standard which would be impossible to meet. Other jurisdictions have rejected the precise argument made by petitioners because it creates an impossible condition for those currently incarcerated. *See People v. Martin*, 107 Cal. App. 3d 714, 725, 165 Cal. Rptr.

773 (1980). We agree that "[d]ue process does not require that the absurd be done before a compelling state interest can be vindicated." *Martin*, 107 Cal. App. 3d at 725, 165 Cal. Rptr. 773. Indeed, in drafting the Statute, the Legislature expressly noted that the involuntary commitment statute, RCW 71.05, was an inadequate remedy because confinement prevented any overt act. RCW 71.09.010. We conclude that where the individual is currently incarcerated no evidence of a recent overt act is required.

However, where an individual has been released from confinement on a sex offense (as referenced in RCW 71.09.030) and lives in the community immediately prior to the initiation of sex predator proceedings, the above rationale does not apply. Under *Harris*, proof of a recent overt act is necessary to satisfy due process concerns when an individual has been released into the community. 98 Wn.2d at 284, 654 P.2d 109. When an individual has been in the community, the State has the opportunity to prove dangerousness through evidence of a recent overt act. We construe statutes to render them constitutional. Therefore, we hold that the State must provide evidence of a recent overt act in accord with *Harris* whenever an individual is not incarcerated at the time the petition is filed. For non-incarcerated individuals, a sex predator petition under RCW 71.09.030 must include an allegation of a recent overt act sufficient to establish probable cause when considered in conjunction with the other factors listed in RCW 71.09.040.

Petitioner Cunningham was released from prison and living in the community for some 4 ½ months before the State filed a sex predator petition. He was gainfully employed as an assistant engineer on a ship and was planning to go to sea for a period of time. The State did not allege a recent overt act in its petition, nor did the State offer such evidence at Cunningham's trial. We find, therefore, that the proof presented at trial was insufficient and Cunningham's commitment as a sex predator is hereby reversed.

In sum, the Statute does not violate substantive due process. The State's interest in preventing the sort of harm exacted by sexually violent predators is clearly compelling. The Statute complies with due process because it conditions civil commitment on a finding of both a mental disorder and dangerousness. The Supreme Court's opinion in *Foucha* does not alter this long-established law, nor forbid Washington's efforts to ameliorate an important societal problem. As noted by the chair of the task force when he transmitted the *Report* to the Governor, the Statute is "a serious response commensurate with the harm caused". *Report*, Letter of transmittal from Norm Maleng to The Hon. Booth Gardner (Nov. 28, 1989).

IV

PROCEDURAL DUE PROCESS

Petitioners contend that the Statute must be overturned because it deprives them of their liberty without adequate procedural protections and denies them equal protection. Several procedural infirmities are alleged: that the ex parte finding of probable cause denies meaningful predeprivation due process, that consideration of less restrictive alternatives to confinement is necessary, that the burden of proof at trial is inadequate because the jury need not be unanimous, that the Statute is void for vagueness, and that petitioners were unconstitutionally denied a right to remain silent.[13]

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[13]Petitioners argue additionally that the Statute is facially invalid because of defects in the procedures for release. The release provisions of the two civil commitment statutes differ. The maximum period of commitment under RCW 71.05 is 180-day intervals. At the expiration of each period, the detainee is entitled to the full range of procedural protections, including jury trial. RCW 71.05.310, .320(2). The confinement interval for sex predators is 1 year, and after one petition has been rejected, the burden shifts to the detainee to show he or she is safe to be at large. RCW 71.09.090-.100. Because neither petitioner here has applied for release, the record before the court is insufficient to decide if

1. Probable Cause Hearing.

Petitioners argue that an adversarial probable cause hearing is required by due process considerations. During the 45-day period prior to trial, despite repeated requests, petitioners were denied the opportunity to appear personally in court. Although this detention is preceded by a judicial determination that probable cause exists, RCW 71.09.040, the decision is made ex parte and without prior notice to the detainee.

In contrast, under RCW 71.05 (involuntary commitment), an individual is subject first to a 72-hour detention for evaluation and treatment. RCW 71.05.150(1)(b). That statute also requires a psychological evaluation within the first 24 hours of detention. RCW 71.05.210. A probable cause hearing, at which the individual may be present, is then held to determine if an additional 14-day detention is warranted. RCW 71.05.200.

The standard for determining the appropriate level of procedure that is due prior to depriving an individual of his right to life, liberty or property is well established:

> [T]he specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

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the Statute contains adequate release provisions. We decline to decide the matter on the limited information before us.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976). We have said that this is "[t]he appropriate test for reviewing the constitutional adequacy of involuntary commitment procedures". *In re LaBelle*, 107 Wn.2d 196, 221, 728 P.2d 138 (1986) (citing *Dunner v. McLaughlin*, 100 Wn.2d 832, 839, 676 P.2d 444 (1984)); *see also In re Schuoler*, 106 Wn.2d 500, 510, 723 P.2d 1103 (1986); *In re Harris*, 98 Wn.2d 276, 285, 654 P.2d 109 (1982). Thus, the court must balance the extent of the individual's interest against the interests of the State.

In addition, equal protection principles of the Fourteenth Amendment and article 1, section 12 of our constitution require that we examine the protections contained in the Statute in light of protections afforded those who are committed under the involuntary commitment statute. The equal protection clause requires that "persons similarly situated with respect to the legitimate purposes of the laws receive like treatment".[14] *In re Knapp*, 102 Wn.2d 466, 473, 687 P.2d 1145 (1984). To determine if equal protection has been violated, we examine the purpose of the Statute -- incapacitation and treatment of violent offenders.

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[14]Both this court and the United States Supreme Court have repeatedly applied this provision to a comparison of different commitment schemes. Thus, commitment of the mentally retarded has been compared to involuntary civil commitment, *Heller v. Doe*, 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993); court-ordered treatment has been compared to the sexual psychopathy statute, *In re Knapp*, 102 Wn.2d 466, 687 P.2d 1145 (1984); commitment for incompetency to stand trial has been compared to civil commitment under RCW 71.05, *In re Patterson*, 90 Wn.2d 144, 579 P.2d 1335 (1978); commitment of the criminally insane has been compared to civil commitment of the mentally ill, *Baxstrom v. Herold*, 383 U.S. 107, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966); commitment in lieu of sentence under the Wisconsin sex crimes law has been compared to commitment for treatment under the mental health act, *Humphrey v. Cady*, 405 U.S. 504, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972); and, commitment for incompetency to stand trial has been compared with all other civil commitments, *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972).

It is important to note at the outset that there are good reasons to treat mentally ill people differently than violent sex offenders. *See People v. Pembrock*, 62 Ill. 2d 317, 322, 342 N.E.2d 28 (1976) (A sexually dangerous person "creates different societal problems, and his past conduct is different in degree and kind from the conduct of persons in the larger, more inclusive class defined under the Mental Health Code".). Sexually violent predators are generally considerably more dangerous to others than the mentally ill. Treatment methods are also markedly different for the two populations. *See* RCW 71.09.010. Nevertheless, these distinctions between the two groups must be related to any differences in treatment under the respective statutes. That is, "[e]qual protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made". *Baxstrom v. Herold*, 383 U.S. 107, 111, 86 S. Ct. 760, 763, 15 L. Ed. 2d 620 (1966). The Supreme Court has said that the dangerousness of the detainee "may be a reasonable distinction for purposes of determining the type of *custodial or medical care* to be given, but it has *no relevance whatever* in the context of the opportunity to show whether a person is mentally ill at *all*". (Some italics ours.) *Baxstrom*, at 111, 86 S. Ct. at 763.

All individuals who are involuntarily committed are entitled to procedural and substantive protections. *Jackson v. Indiana*, 406 U.S. 715, 724, 92 S. Ct. 1845, 1851, 32 L. Ed. 2d 435 (1972). Thus, the Court in *Jackson* held:

> that by subjecting Jackson to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, and by thus condemning him in effect to permanent institutionalization without the showing required for commitment or the opportunity for release . . . Indiana deprived petitioner of equal protection of the laws under the Fourteenth Amendment.

Jackson, 406 U.S. at 730, 92 S. Ct. at 1854. A person cannot be deprived of procedural protections afforded other individuals merely because the State makes the decision to seek commitment under one statute rather than another statute. *Humphrey v. Cady*, 405 U.S. 504, 512, 92 S. Ct. 1048, 1053-54, 31 L. Ed. 2d 394 (1972). Thus, in regard to the initial determination of whether there is probable cause for detention, an individual is entitled to the same opportunity to appear before the court to contest detention in any civil commitment proceeding.

Application of the due process and equal protection principles discussed above requires that detainees under the Statute be afforded an opportunity to appear in person to contest probable cause. Petitioners' liberty interests are substantially infringed during the 45-day period leading up to trial. Absent an opportunity to appear and respond to the petition for commitment, we believe that the risk of wrongful detention is too great.

In contrast, the burden of providing notice and an opportunity for a detainee to appear is not too onerous. The breadth of such a hearing would remain within the discretion of the trial court. Insofar as this hearing is limited to verification of the detainee's identity and the determination of probable cause to believe that he or she is a sexually violent predator, we do not anticipate a lengthy proceeding. Because many of the individuals affected will be imprisoned prior to commitment, *see* RCW 71.09.030, notification of the proceedings is simple.

In *Harris*, we imposed such requirements as a function of "inherent judicial power". *In re Harris*, 98 Wn.2d 276, 287, 654 P.2d 109 (1982). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands". *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972).

On several prior occasions, we have supplemented the commitment procedures of RCW 71.05 to bring that statute into compliance with procedural due process guaranties. *In re Schuoler*, 106 Wn.2d 500, 510, 723 P.2d 1103 (1986); *In re Cross*, 99 Wn.2d 373, 662 P.2d 828 (1983); *In re Harris*, *supra*. In addition, we often interpret statutes in a manner which renders them constitutional. *State v. Browet, Inc.*, 103 Wn.2d 215, 219, 691 P.2d 571 (1984). Here, too, additional procedures are needed to ensure that the Statute is enforced fairly.

Therefore, we hold that a 72-hour hearing is required by the constitutional guaranty to due process, and must be available to detainees under the Statute. While this requirement was not complied with here, it had no bearing on the ultimate outcome of petitioners' trials; thus the omission in this instance does not require reversal.

2. Less Restrictive Alternative.

Petitioners argue that the Statute violates equal protection because it does not require consideration of less restrictive alternatives to confinement. They point to the mental health statute, RCW 71.05, which requires consideration of such alternatives as a precursor to confinement. *See* RCW 71.05.240, .320.

We agree. The State cannot provide different procedural protections for those confined under the sex predator statute unless there is a valid reason for doing so. Here, the State offers no justification for not considering less restrictive alternatives under 71.05, and denying the same under RCW 71.09. Not all sex predators present the same level of danger, nor do they require identical treatment conditions. Similar to those committed under RCW 71.05, it is necessary to account for these differences by considering alternatives to total confinement. We therefore hold that equal protection requires the State to comply with provisions of RCW 71.05 as related to the consideration of less restrictive alternatives.

Less restrictive alternatives were not considered in either Young's or Cunningham's respective trials. Given our resolution in Cunningham's case, we are concerned only with the effect of this holding in regard to Young. We remand Young's case for consideration of alternatives to confinement. Because the sex predator determination has already been made, the finder of fact need only consider if the less restrictive alternatives are appropriate.

3. Jury Verdict and Selection.

Petitioners claim that the Statute provides an inadequate burden of proof by failing to require a unanimous verdict. The Statute is silent on the issue, but we believe that it must be construed to afford an individual the right to a unanimous 12-person verdict.

Our primary goal in interpreting statutes is to carry out the intent of the Legislature. *Anderson v. O'Brien*, 84 Wn.2d 64, 67, 524 P.2d 390 (1974). The sexually violent predator Statute requires the State to prove beyond a reasonable doubt that the person is a sexually violent predator. RCW 71.09.060(1). The Legislature's use of the "beyond a reasonable doubt" standard suggests an acute awareness of the need for heightened procedural protections in these proceedings. Moreover, in Washington, the beyond a reasonable doubt standard generally requires a unanimous verdict. *See State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). Considering the context normally associated with this high burden of proof, *State v. Elgin*, 118 Wn.2d 551, 556, 825 P.2d 314 (1992), we find that the Legislature included the need for a unanimous verdict when it required "proof beyond a reasonable doubt" in the statutory scheme.

Here, over defense objections, the jury in Cunningham's trial was not instructed that unanimity was required, and an 11-to-1 verdict was returned -- at least one person on the jury felt that the State failed to meet its burden. Under the standards announced here, the verdict was

insufficient. In Young's case, the verdict was unanimous, and the jury's finding is affirmed.

Petitioners also contend that they are entitled to 12 peremptory challenges at trial. Young requested the additional challenges at a pretrial hearing. The trial court refused, and apparently gave three challenges to each side, plus an additional challenge to be used for the alternate seat. Cunningham also requested additional challenges. The trial court granted six challenges per side plus one for each alternate. Neither petitioner claims that he was prejudiced by the allegedly insufficient number of challenges; indeed, neither petitioner even submits the record of voir dire.

Petitioners argue that because the Statute subjects them to indefinite incarceration, they should be afforded the same number of peremptory challenges as defendants in capital cases under CrR 6.4. We disagree. The proceedings here are civil, not criminal, in nature. Thus, the appropriate number of challenges is found in RCW 4.44.130, which deals with civil juries: "Each party shall be entitled to three peremptory challenges". *See also* 14 Lewis H. Orland & Karl B. Tegland, Wash. Prac., *Trial Practice Civil* § 206, at 334 (4th ed. 1986). This is the same number of peremptory challenges allowed in RCW 71.05 civil commitment proceedings. *See* MPR 3.4(a). Therefore, three peremptory challenges are sufficient.

4. Vagueness.

Petitioners and amicus American Civil Liberties Union argue that various terms in the Statute -- such as "comparable", "sexually motivated", "safe to be at large", "mental abnormality", and "likely" -- are unconstitutionally vague.

> The issue of vagueness involves the procedural due process requirements of fair notice of the conduct warranting detention and clear standards to prevent arbitrary enforcement by those charged with administering the applicable statutes.

In re LaBelle, 107 Wn.2d 196, 201, 728 P.2d 138 (1986) (citing *Hontz v. State*, 105 Wn.2d 302, 308, 714 P.2d 1176 (1986); *see also Clyde Hill v. Roisen*, 111 Wn.2d 912, 916, 767 P.2d 1375 (1989). Exact specificity is not required; rather, the language used must be susceptible to understanding by persons of ordinary intelligence. *Seattle v. Eze*, 111 Wn.2d 22, 26-27, 759 P.2d 366, 78 A.L.R.4th 1115 (1988). We do not find the Statute to be so vague as to deny due process.

Ample standards are present to guide the exercise of discretion and to provide notice to potential detainees of prohibited conduct. The Statute is quite specific and explicit. It requires that a person "who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence", RCW 71.09.020(1), as determined at a jury trial if so requested, RCW 71.09.050, be committed to the custody of DSHS for care and treatment. RCW 71.09.060. The definitional section sets out precise standards, and defines "mental abnormality". RCW 71.09.020(2). As the record indicates, the experts who testified at the commitment trials adequately explained and gave meaning to this term within a psychological context. *E.g.*, CPY, (Feb. 2, 1991), at 159-60; CPC (May 5, 1991), at 54-65. Likewise, the term "personality disorder" has a well accepted psychological meaning. *See DSM-III-R* at 335-58. The application of these standards to a particular set of facts is, of course, a determination for the factfinder, but the definitions provide sufficient guidance to do so properly.

Similar challenges based on vagueness have been rejected. The United States Supreme Court, in analyzing a sexual psychopath statute, held that the statute was not vague because it could be applied only to a narrowly defined group of offenders. *Minnesota ex rel. Pearson v. Probate Court*,

309 U.S. 270, 274-75, 60 S. Ct. 523, 525-26, 126 A.L.R. 530 (1940). The statute there turned on "underlying conditions, calling for evidence of past conduct pointing to probable consequences . . . as susceptible of proof as many of the criteria constantly applied in prosecutions for crime." *Pearson*, at 274, 60 S. Ct. at 526. Similarly, our Statute calls for particular evidence of past conduct and a propensity toward violence. *See also People v. Pembrock*, 62 Ill. 2d 317, 342 N.E.2d 28 (1976). The sex predator Statute is not so vague that it denies due process.

5. Right to Remain Silent.

Petitioners argue that they were denied their right to remain silent. Both were ordered by the trial court to speak to the State's psychologists. In addition, testimony was allowed at trial that Young refused to abide by the court's order. First, petitioners claim that the Fifth Amendment privilege against self-incrimination should apply to them. Second, they argue that because persons committed under the involuntary commitment act, RCW 71.05, have a right to remain silent, application of equal protection to the Statute compels this court to find that sexually violent predators possess that same right.

Under the Fifth Amendment, no person "shall be compelled in any criminal case to be a witness against himself". The Supreme Court has not entirely limited application of the Fifth Amendment privilege to criminal cases. *See, e.g., Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886). However, the Court has refused to apply the privilege to civil cases unless it has been shown conclusively that the penalty imposed is punishment tantamount to a criminal sanction. *United States v. Ward*, 448 U.S. 242, 254, 100 S. Ct. 2636, 2644, 65 L. Ed. 2d 742 (1980). More to the point, in assessing the Illinois statute, found above to be significantly similar to RCW 71.09, the Supreme Court held that the Fifth Amendment does not apply. *Allen v. Illinois*, 478 U.S. 364, 375, 106 S. Ct. 2988,

2995, 92 L. Ed. 2d 296 (1986). Where, as here, "the State serves its purpose of *treating* rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment", the action is not a "criminal case" for purposes of the privilege against compulsory self-incrimination. *Allen*, at 373-74, 106 S. Ct. at 2994.[15]

Furthermore, we see good reasons to refuse the statutory right to remain silent to sexually violent predators even though the Legislature has granted such a right to the mentally ill. Equal protection requires that similarly situated persons be treated alike. *In re Knapp*, 102 Wn.2d 466, 473, 687 P.2d 1145 (1984). However, sexually violent predators are not similarly situated to the mentally ill in regard to the treatment methods employed, or the information necessary to ensure that they receive proper diagnosis and treatment. The Legislature made specific findings which are pertinent to this distinction:

> [A] small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act, chapter 71.05 RCW . . .. [S]exually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. . . . The legislature further finds that the prognosis for curing sexually violent offenders is poor, . . . and the treatment modalities for this population are very

[15]Of course, detainees could not be compelled to incriminate themselves by answering questions about prior uncharged or unconvicted criminal behavior. *See State v. Post*, 118 Wn.2d 596, 610-11, 826 P.2d 172, 837 P.2d 599 (1992).

> different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act.

RCW 71.09.010. The problems associated with the treatment of sex offenders are well documented, and have continued to confound mental health professionals and legislators. The mental abnormalities or personality disorders involved with predatory behavior may not be immediately apparent. Thus, their cooperation with the diagnosis and treatment procedures is essential.[16] *See also Heller*, 509 U.S. at 325, 113 S. Ct. at 2645 ("the different treatment to which a committed individual is subjected provides a rational basis."); *Bailey v. Gardebring*, 940 F.2d 1150, 1153 (8th Cir. 1991) (no constitutional right is violated when persons who suffer from severe mental disorders are treated differently from persons with less serious disorders), *cert. denied*, 503 U.S. 952, 112 S. Ct. 1516, 117 L. Ed. 2d 652 (1992); *People v. Parrott*, 244 Ill. App. 3d 424, 184 Ill. Dec. 278, 283, 613 N.E.2d 305, 310 (1993) (When individual is committed using "beyond a reasonable doubt" standard, "he was not more harshly treated than other persons whose commitment rests upon a finding of mental illness by clear and convincing evidence".).

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[16]Our rejection of petitioners' claim to a right to remain silent resolves several additional issues. First, petitioners claim that expert opinion testimony was based on statements obtained in violation of petitioners' right to remain silent. Second, petitioners assert that they have the unequivocal right to testify without notifying the State in advance. Because these proceedings are civil in nature, and because petitioners have no absolute right to remain silent, these contentions are without merit. Moreover, since we reverse the verdict against Cunningham, we need not consider the State's argument made on cross appeal, that the admission of his testimony despite discovery violations was in error.

V

EVIDENTIARY ISSUES

1. Prior Crimes.

Petitioners contend that several of the State's witnesses should not have been allowed to testify, and that other testimony was admitted in error. They claim that all the testimony of the victims of their prior crimes should have been excluded, as it was irrelevant and unfairly prejudicial. In addition, they argue that the victims' testimony pertaining to their emotional state at the time of the crimes should have been excluded as unfairly prejudicial. Cunningham argues separately that evidence relating to his juvenile conviction should have been excluded. Young claims that testimony about his 1972 bomb threat conviction was inadmissible.

Generally, all relevant evidence is admissible and all irrelevant evidence is inadmissible. ER 402. Relevant evidence is any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence". ER 401. Even relevant evidence will be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice". ER 403. The determination of relevance is within the broad discretion of the trial court, and will not be disturbed absent manifest abuse of that discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S. Ct. 752, 112 L. Ed. 2d 772 (1991).

The evidence here was properly admitted. The manner in which the previous crimes were committed has some bearing on the motivations and mental states of the petitioners, and is pertinent to the ultimate question here. Moreover, the likelihood of continued violence on the part of petitioners is central to the determination of whether they are sexually violent predators under the terms of the Statute. Thus, we cannot say that the trial court abused its discretion

in admitting the victims' testimony. Although we agree that the testimony presented by the victims was compelling, and, therefore, had a substantial effect on the jury, we do not believe that its prejudicial effect outweighed its probative value. In assessing whether an individual is a sexually violent predator, prior sexual history is highly probative of his or her propensity for future violence.

In a similar vein, the trial court acted within its discretion when it admitted evidence of Cunningham's sexually motivated juvenile conviction. A person's history of sexually violent offenses is relevant to the sex predator determination. RCW 71.09.020(1). By using the word "offense", the Legislature indicated an intent to include prior juvenile adjudications within the scope of permissible proof at sex predator proceedings. *See In re A, B, C, D, E*, 121 Wn.2d 80, 87, 847 P.2d 455 (1993).

We do not, however, perceive any relevance to the testimony presented about Young's 1972 conviction for a bomb threat. The threat was made on a college campus where Young was a student. No sexual motivation was alleged for this crime. On the other hand, it is hard to conceive of any juror attaching much significance to the conviction in light of Young's prior history of violent sex offenses, which includes at least six felony rapes. The jury instructions make it clear that only sex offenses or sexually motivated felonies are considered in making the sex predator determination. Any error was harmless.

2. Validity of Prior Convictions.

Young contends that all evidence relating to his conviction in 1963 for four rapes should have been excluded because the jury instructions given there were in error. We disagree. The trial court properly held that the convictions were admissible.[17]

[17]Although a habeas corpus petition is currently being considered on its merits, the judgment and sentence are facially valid, *see*

We have previously held that the State may use prior convictions without proving their constitutional validity in appropriate circumstances. *State v. Ammons*, 105 Wn.2d 175, 187, 713 P.2d 719, 718 P.2d 796, *cert. denied*, 479 U.S. 930, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986). Because an individual subject to civil commitment would have no greater constitutional protections in this regard, we apply the *Ammons* case by analogy. In sentencing proceedings, the court has established the following rule:

> [A] prior conviction which has been previously determined to have been unconstitutionally obtained or which is constitutionally invalid on its face may not be considered. Constitutionally invalid on its face means a conviction which without further elaboration evidences infirmities of a constitutional magnitude.

(Citations omitted.) *Ammons*, at 187-88, 713 P.2d 719. To hold otherwise would require appellate review of all prior convictions, which would "unduly and unjustifiably overburden the [trial] court". *Ammons*, at 188, 713 P.2d 719.

Finally, Young contends that the testimony of interrogating officers concerning his confessions to the rapes was wrongly admitted. He argues that because tape recordings were made (but not offered into evidence) the testimony must be excluded. Furthermore, he asserts that he should have been permitted to offer impeachment evidence of a criminal trespass charge and disciplinary history against the officers. These arguments are patently meritless.

ER 803(a)(22), and have been affirmed on appeal. *State v. Young*, 65 Wn.2d 938, 400 P.2d 374, *cert. denied*, 382 U.S. 963, 86 S. Ct. 446, 15 L. Ed. 2d 365 (1965).

3. Expert Testimony.

Petitioners argue that the testimony of the State's expert witnesses, Dr. Dreiblatt and Dr. Rawlings, should have been excluded because they testified as to theories which are not generally accepted in the scientific community. They contend that the experts had no basis for their testimony that any particular mental abnormality or personality disorder exists which makes a person likely to rape, or that Young or Cunningham was in fact likely to re-offend. They are supported in this claim by amicus, the Washington State Psychiatric Association. We conclude that the testimony was properly admitted.

Petitioners point to testimony offered by their own experts that rape is not necessarily caused by mental illness or disease. At trial, the jury heard a broad spectrum of evidence pertaining to the petitioners' condition. In addition to the State's expert testimony presenting the diagnoses of petitioners, the jury heard testimony from experts presenting the contrary view. From this evidence relating both to the accuracy of the diagnosis in general, and the specific criticism of the diagnoses made in Young's and Cunningham's cases, the jury was able to return a verdict that petitioners were sexually violent predators.

Initially, we must determine "if the evidence in question has a valid, scientific basis". *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993). The standard for determining if evidence based on novel scientific procedures is admissible is that set forth in *Frye v. United States*, 293 F. 1013, 1014, 34 A.L.R. 145 (D.C. Cir. 1923) (rejecting precursor to the modern polygraph test). The rule is well established:

> [E]vidence deriving from a scientific theory or principle is admissible only if that theory or principle has achieved general acceptance in the relevant scientific community.

State v. Martin, 101 Wn.2d 713, 719, 684 P.2d 651 (1984) (rejecting hypnotically induced testimony). Under *Frye*, "[t]he core concern . . . is only whether the evidence being offered is based on established scientific methodology". *Cauthron*, at 889, 846 P.2d 502.

We have previously held that predictions of future dangerousness do not violate due process, despite the inherent uncertainties of psychiatric predictions. *In re Harris*, 98 Wn.2d 276, 280, 654 P.2d 109 (1982). Our reasoning there is convincing in this context as well:

> Petitioner's argument would eviscerate the entire law of involuntary commitment as well as render dubious the numerous other areas where psychiatry and the law intersect. There is no question the prediction of dangerousness has its attendant problems. . . .
>
> . . . But we are not prepared to abandon the possibility of conforming the law of involuntary civil commitment to the requirements of the constitution.

Harris, at 280-81, 654 P.2d 109. In addition, we have held that a finding of future dangerousness provides an appropriate reason to impose an exceptional sentence on a sex offender. *State v. Pryor*, 115 Wn.2d 445, 454, 799 P.2d 244 (1990). Our holding in Pryor implies that predictions of future dangerousness are sufficiently accurate and reliable. We see no reason to reconsider that holding here. *See State v. Janes*, 121 Wn.2d 220, .235, 850 P.2d 495 (1993) (independent Frye determination unnecessary when an analogous proposition has already been deemed admissible).

We are also not persuaded that the trial court erred in allowing the remainder of the experts' testimony. The sciences of psychology and psychiatry are not novel; they have been an integral part of the American legal system since its inception. Although testimony relating to mental illnesses

and disorders is not amenable to the types of precise and verifiable cause and effect relation petitioners seek, the level of acceptance is sufficient to merit consideration at trial. As Justice White pointed out in *Foucha*, "such opinion is reliable enough to permit the courts to base civil commitments on clear and convincing medical evidence that a person is mentally ill and dangerous". 504 U.S. at 76 n.3, 112 S. Ct. at 1783 n.3.

Our position is supported by the Legislature's determination, following numerous hearings, that the sexually violent predator condition is not only recognized, but treatable and capable of diagnosis. *See* RCW 71.09. As Justice O'Connor pointed out in *Foucha v. Louisiana*, 504 U.S. 71, 87, 112 S. Ct. 1780, 1789, 118 L. Ed. 2d 437 (1992), the inherent uncertainty involved in making psychological judgments requires courts to "'. . . pay particular deference to reasonable legislative judgments' about the relationship between dangerous behavior and mental illness." (O'Connor, J., concurring) (quoting *Jones v. United States*, 463 U.S. 354, 365 n.13, 103 S. Ct. 3043, 3050 n.13, 77 L. Ed. 2d 694 (1983)).

Next, we must determine if expert testimony was properly admitted. ER 702 provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The determination of whether expert testimony is admissible is within the discretion of the trial court. *State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992). Unless there has been an abuse of discretion, this court will not disturb the trial court's decision.

The 2-part test we apply for ER 702 matters is whether: "(1) the witness qualifies as an expert and (2) the expert testimony would be helpful to the trier of fact." *Cauthron*, 120 Wn.2d at 890, 846 P.2d 502. Here, there is no dispute as to either of the State's experts' qualifications. Moreover, the expert testimony was certainly helpful to the trier of fact -- psychiatric testimony is central to the ultimate question here: whether petitioners suffer from a mental abnormality or personality disorder.

In a related argument, Young claims that Dr. Dreiblatt's testimony that Young suffers from a *combination* of mental abnormality and personality disorder was insufficient to meet the definition of sexually violent predator. We disagree. The definition is phrased in the alternative and states that a sexually violent predator is someone who suffers from a mental abnormality or a personality disorder. RCW 71.09.020(1). We must construe it, however, in a manner which effectuates its purpose. *Wichert v. Cardwell*, 117 Wn.2d 148, 151, 812 P.2d 858 (1991). The Legislature intended that all dangerous sex offenders be incapacitated and treated. Frequently, as Young's case amply demonstrates, an individual will suffer from multiple mental abnormalities and personality disorders which make violent rape likely. It would thwart the legislative purpose if the Statute only allowed the commitment of those who suffer from one or the other, while prohibiting the commitment of more seriously afflicted sexually violent predators. Thus, the showing that Young suffers both a mental abnormality *and* a personality disorder meets the requirements of the Statute.

Petitioners also claim that the expert testimony should be excluded because it was based on hearsay. Under ER 703, an expert's opinion may be heard on materials "of a type reasonably relied upon by experts in the particular field". Both experts for the State here relied on psychological reports and criminal history of petitioners. They testified that

these are the types of materials reasonably relied on to diagnose future dangerousness of sex offenders. Indeed, in the face of petitioners' refusals to cooperate, no other course was open to the State's experts.

Finally, it must be pointed out that petitioners each presented expert testimony of their own. The juries were urged by defense experts to reject the opinions of the State's experts, and had ample opportunity to weigh the testimony of both sides. The ultimate decision of whether or not petitioners were sexually violent predators was made by the factfinder only after a thorough presentation of the experts' views.

VI

CONCLUSION

In sum, we conclude that the overall statutory scheme presented in the sexually violent predator portions of the Act is constitutional. We hold that RCW 71.09 is civil rather than criminal, and does not violate either the prohibition against ex post facto laws or the double jeopardy clause. We further hold, after a searching inquiry, that the basic statutory scheme implicates no substantive due process concerns. Although we conclude that a detainee must be permitted to appear in court within 72 hours to contest probable cause, the failure to accord petitioners this right was harmless error.

We conclude that the Statute is not void for vagueness; the terms are sufficiently specific and explicit. Further, due process does not operate to guarantee petitioners a right to remain silent; there are ample reasons to treat these detainees differently than others involuntarily committed. As to the remaining evidentiary issues, in most instances the trial courts acted properly within their discretion. The testimony of the victims of previous sexual crimes, including any juvenile offenses, is relevant and may be admitted. The expert testimony was also properly admitted. We hold that the evidence pertaining to a bomb threat conviction in

Young's case was inadmissible, but that error was harmless. Finally, we have given ample consideration to all of the remaining arguments raised in the personal restraint petitions and on appeal, as well as those advanced by amici, and conclude that they lack merit.

Turning to the specific disposition in petitioners' cases, we reverse Cunningham's commitment due to the State's failure to prove dangerousness through evidence of a recent overt act. Also, the commitment was in error because the jury was not unanimous. We affirm the sex predator determination in petitioner Young's case, but remand solely for a consideration of less restrictive alternatives.

ANDERSEN, C.J., and BRACHTENBACH, DOLLIVER, GUY, and MADSEN, JJ., concur.

JOHNSON, J. (dissenting) -- I dissent.

> [I]ncarceration of persons is . . . one of the most feared instruments of state oppression and . . . freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments . . ..[18]

The sexually violent predator statute, RCW 71.09 (hereinafter Statute), is a well-intentioned attempt by the Legislature to keep sex predators off the streets. However, by authorizing the indefinite confinement in mental facilities of persons who are not mentally ill, the Statute threatens not only the liberty of certain sex offenders, but the liberty of us all. By committing individuals based solely on perceived dangerousness, the Statute in effect sets up an Orwellian "dangerousness court", a technique of social control fundamentally incompatible with our system of ordered liberty guaranteed by the constitution and contrary to the

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[18] *Foucha v. Louisiana*, 504 U.S. 71, 90, 112 S. Ct. 1780, 1791, 118 L. Ed. 2d 437 (1992) (Kennedy, J., dissenting).

recent United States Supreme Court decision in *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992).

History has proven the grave error in creating special classes of individuals for whom constitutional rights are diminished. Today the majority condones the Legislature's creation of such a special class, trampling these individuals' rights. I cannot agree. The Statute is nothing more or less than a preventive detention scheme based on allegations of future dangerousness. Once a person has committed a sexually motivated crime, no matter how remote in time or place, the State is authorized to hold that person forever for the "good of the community". Our community would be better served by steadfast adherence to constitutional principles.

The majority concedes the unconstitutionality of the Statute and attempts to salvage it by reading in requirements not included by the Legislature. Unfortunately, the majority's pen stops short. Under *Foucha*, the State must prove an individual is *both* mentally ill and dangerous before the person can be involuntarily committed; however, the Statute still fails to meet the mental illness requirement. Thus, the Statute offends the due process clause by subjecting individuals to lifetime confinement based not on any crime committed, but instead on fears of future crimes, and it offends the prohibitions against ex post facto laws and double jeopardy by masquerading as a civil commitment law when its purpose is penal.

I

SUBSTANTIVE DUE PROCESS

The sexual predator Statute violates substantive due process. Under the Fifth and Fourteenth Amendments, no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. 5; U.S. Const. amend. 14, § 1. "[T]he Due Process Clause contains a

substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 983, 108 L. Ed. 2d 100 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 664-65, 88 L. Ed. 2d 662, 106 S. Ct. 677, 88 L. Ed. 2d 662 (1986)). The test to be applied in determining the constitutionality of a statute under substantive due process depends upon whether a fundamental right is at stake.

An individual's liberty interest is fundamental in nature. *See United States v. Salerno*, 481 U.S. 739, 750, 107 S. Ct. 2095, 2103, 95 L. Ed. 2d 697 (1987). "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action". *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 437 (1992); *Reno v. Flores*, 507 U.S. 292, 315, 113 S. Ct. 1439, 1454, 123 L. Ed. 2d 1 (1993) (O'Connor, J., concurring). Physical confinement in a mental institution entails a "massive curtailment of liberty". *Vitek v. Jones*, 445 U.S. 480, 491-92, 100 S. Ct. 1254, 1262-63, 63 L. Ed. 2d 552 (1980).

When a statute implicates a fundamental right such as a person's liberty, the test for whether the statute passes constitutional muster is one of strict scrutiny. For the statute to be constitutional, it must further a compelling state interest and must be narrowly tailored to achieve that interest. *State v. Farmer*, 116 Wn.2d 414, 429, 805 P.2d 200, 812 P.2d 858, 13 A.L.R.5th 1070 (1991); *In re Schuoler*, 106 Wn.2d 500, 508, 723 P.2d 1103 (1986).

Although the majority acknowledges the Statute must pass strict scrutiny, it fails to adequately analyze whether the Statute is narrowly tailored to achieve the State's interest. The most recent statement of the Supreme Court's requirements for narrowly tailoring an involuntary commitment statute is *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). The majority has

failed to see or has chosen to ignore that *Foucha* provides a framework for substantive due process analysis in these types of cases. *Foucha* recognizes only three situations in which the State has such a compelling interest in public safety that a complete deprivation of an individual's liberty interest is justified: criminal conviction, civil commitment, and limited detention of persons shown to be dangerous to the community. *Foucha*, 504 U.S. at 80, 112 S. Ct. at 1785-86.

Even in these three situations, however, the State is required to narrowly tailor its statutes. For example, the requirement that a person be both mentally ill and dangerous is a way to constitutionally tailor civil commitment statutes. In addition, strict time limits for pretrial detention are another specific way to narrow the conditions under which an individual may be confined.

In contrast, the sexual predator Statute is not narrowly tailored to achieve its compelling interest. In order to be narrowly drawn, the Statute must satisfy certain requirements set out by the United States Supreme Court for either civil commitment or preventive detention statutes. The sex predator Statute fails on both counts.

Under civil commitment, substantive due process requires that an individual be both mentally ill and dangerous before he or she may be involuntarily committed. *Foucha*, 504 U.S. at 77, 112 S. Ct. at 1784. In *Foucha*, an insanity acquittee who had regained his sanity sought release from a mental institution. Foucha was found to be no longer mentally ill, but still dangerous to others because of his "antisocial personality, a condition that is not a mental disease and . . . is untreatable". *Foucha*, 504 U.S. at 75, 112 S. Ct. at 1782. The Court held that Foucha's continued confinement based on dangerousness alone violated due process. *Foucha*, 504 U.S. at 77, 112 S. Ct. at 1784.

Like the statute in *Foucha*, RCW 71.09 violates substantive due process because it requires only dangerousness and not mental illness as a prerequisite to

commitment. The Statute, by its own terms, applies specifically to individuals who "do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act". RCW 71.09.010.

The Statute provides for the indefinite commitment of any person deemed to be a "sexually violent predator", but the Statute's definition of this term does not apply to a group of individuals who are mentally ill in any medically recognized sense. *See* La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. Puget Sound L. Rev. 655, 691-92 (1991-1992); Comment, *Sexual Violence, Sanity & Safety: Constitutional Parameters for Involuntary Civil Commitment of Sex Offenders*, 15 U. Puget Sound L. Rev. 879, 898-900 (1991-1992).

The Statute defines "sexually violent predator" as any person who meets the following two criteria: (1) the person must at any time in his or her life been either charged with or convicted of a sexually violent crime; and (2) the person must suffer from "a *mental abnormality* or *personality disorder* which makes the person likely to engage in predatory acts of sexual violence". (Italics mine.) RCW 71.09.020(1). The second criterion involves a prediction of dangerousness based on a "mental abnormality" or "personality disorder", but these two terms do not involve any medically recognized mental illness.

Amicus, the Washington State Psychiatric Association, points out the term "mental abnormality" has no clinically significant meaning and no recognized diagnostic use; the term "abnormality" has long been in disuse because it can have a variety of different meanings. The Statute defines the term "mental abnormality" as:

> a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting

such person a menace to the health and safety of others.

RCW 71.09.020(2). A "mental abnormality" which makes a person "likely to engage in predatory acts of sexual violence" is thus defined by the Statute as a mental condition that may predispose a person to commit a sex crime. RCW 71.09.020(1), (2). This definition is merely circular, and, as one commentator has observed, allows a "mental abnormality" to be established in a circular manner: the "abnormality" will be derived from the person's past sexual behavior, and this in turn will be used to establish the person's predisposition to future dangerous sexual behavior. Wettstein, *A Psychiatric Perspective on Washington's Sexually Violent Predators Statute*, 15 U. Puget Sound L. Rev. 597, 602, 633 (1991-1992) (concluding the Statute's definition of "sexually violent predator" fails to coincide with clinical or empirical knowledge regarding sex offenders). *See also* Rideout, *So What's in a Name? A Rhetorical Reading of Washington's Sexually Violent Predators Act*, 15 U. Puget Sound L. Rev. 781, 793 (1991-1992) (discussing the tautology "in the statement that sexually violent predators have features that lead to sexually violent behavior").

The Statute also does not provide a definition for the term "personality disorder". Amicus points out this term has a clinically recognized meaning, but there is no "personality disorder" specific to sex offenders. Because of this problem, the task of determining whether a causal relationship exists between a "personality disorder" and the person's potential dangerousness is nothing more than "a matter of speculation or meaningless circularity". Wettstein, 15 U. Puget Sound L. Rev. at 603; *see also* Comment, *Washington's Sexually Violent Predator Law: The Need To Bar Unreliable Psychiatric Predictions of Dangerousness From Civil*

Commitment Proceedings, 39 U.C.L.A. L. Rev. 213 (1991-1992).[19]

Despite some psychiatric incantations, therefore, the sexual predator Statute deals with potentially dangerous people, but not mentally ill people. Because under *Foucha* a prediction of dangerousness alone is an unconstitutional basis for indefinite confinement in a mental institution, the Statute violates due process.

Even if a personality disorder or mental abnormality is a mental illness, this court has previously required proof of a recent overt act as evidence of dangerousness before a person can be detained to assess whether he or she is mentally ill. *See In re Harris*, 98 Wn.2d 276, 654 P.2d 109 (1982). The plain language of the sex predator Statute contains no such requirement.[20] The majority attempts to salvage the Statute's constitutionality by reading in a requirement of a recent overt act, but only for individuals who have been released into the community. For individuals currently incarcerated, no evidence of a recent overt act is required.

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[19]The majority chides the dissent for relying on a handful of law review articles in support for the claim that a "mental abnormality" or "personality disorder" does not constitute "mental illness" as required by *Foucha*. Majority, at 33 n.10. It is curious that the majority also relies on a law review article in support of its proposition that the Statute's terms do constitute "a number of recognized mental pathologies", *i.e.*, mental illness. See majority, at 27. It is also curious that, after concluding the statute requires a showing of mental illness, the majority states in its equal protection analysis, "there are good reasons to treat *mentally ill people* differently than *violent sex offenders*". (Italics mine.) Majority, at 44. The majority cannot have it both ways.

[20]To commit a person under the Statute, the State is required to reprove the defendant committed a prior crime and to present an evaluation by a psychologist establishing the person is likely to reoffend. However, this "evaluation" is often based merely on a review of the police reports and prior psychological evaluations rather than on a personal interview with the defendant.

This judicial rewriting of the Statute is unprincipled decisionmaking at its worst. Although the majority is correct that a court must construe a statute to render it constitutional, majority at 46, *a court cannot rewrite a statute by reading into it language that simply is not there. Addleman v. Board of Prison Terms & Paroles*, 107 Wn.2d 503, 509, 730 P.2d 1327 (1986) (stating a court may not "read into a statute those things which it conceives the Legislature may have left out unintentionally"); *In re Taylor*, 105 Wn.2d 67, 69, 711 P.2d 345 (1985) (stating if language of a statute is clear, a court may not "read things into it which are not there"). Such judicial rewriting is not only unprincipled, but also unfair. The parties could not have anticipated this new construction and have not had an opportunity to brief or argue the constitutionality of the majority's new version of the Statute.

The court's wholesale reading in of an overt act requirement also runs counter to the Legislature's intent. The Statute was enacted in response to intense public outcry over two brutal sex crimes: the rape and mutilation of a Tacoma boy, and the rape and murder of a Seattle woman. *See* Boerner, *Confronting Violence: In the Act & in the Word*, 15 U. Puget Sound L. Rev. 525 (1991-1992). The individuals who committed the crimes had recently been released after serving time for previous sex crimes. To the extent that the majority now requires evidence of a recent overt act by such released individuals, the majority paves the way for a repeat of the above brutal crimes, which is exactly what the legislation was enacted to avoid! This is an absurd result.

Finally, the majority's rewriting of the Statute raises new equal protection concerns. By reading in this new requirement, the court creates two classes of persons under the same statute: those incarcerated versus those who are not. This is a distinction without a difference. Immediately upon release, an individual must now commit an overt act to be incarcerated under the Statute, whereas the day before

release, the same individual could be committed without proof of an overt act. This new distinction is arbitrary, violating even a rational basis review.

Equal protection requires that "persons similarly situated with respect to the legitimate purposes of the laws receive like treatment". *In re Knapp*, 102 Wn.2d 466, 473, 687 P.2d 1145 (1984). The purpose of the Statute is to prevent sexual predators from reoffending and thereby protect the community. It is difficult to see the difference between an individual the day before he or she leaves prison versus an individual the day after departing from jail. The only rationale offered by the majority is that an incarcerated individual does not have the opportunity to commit a recent overt act. I disagree. Evidence amounting to a "recent overt act" is often present even while in jail. Such evidence could be based on prison activities or conduct, such as inappropriate drawings of sexual encounters with children.

The court cannot choose to have two standards for commitment: one for those presently incarcerated and another for everybody else.[21] The United States Supreme Court has been careful to harmonize the constitutional requirements for *civil* commitment in the ordinary situation with those arising when there has been a finding of insanity at a *criminal* trial. *See Jones v. United States*, 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983). Although the majority's requirement of a recent overt act by released individuals harmonizes RCW 71.09 with the State's short-term detention statute, RCW 71.05,[22] this requirement

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[21]The majority implies that *Heller v. Doe*, 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) authorizes a 2-tier civil commitment process. Majority, at 67 n.14. *Heller* is inapt, however, for two reasons: first, the Court did not review the Statute under a heightened scrutiny standard, and second, it deals with mentally retarded, not mentally ill, persons.

[22]The majority also reads into RCW 71.09 a requirement from RCW 71.05, which requires the State to consider less restrictive alternatives as a precursor to confinement. Majority, at 47. Although

does not render the Statute constitutional. Under the majority's interpretation, incarcerated individuals still face the potential for lifetime detention based only on the possibility of future dangerousness. Because incarceration under the Statute can follow a long prison term and because the majority does not require a recent overt act for these individuals, the determination that they are "dangerous" is not even based on the same standard used for others who are

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perhaps a good idea, the majority's rewriting of the Statute is still inappropriate for the same reasons discussed above. By reading in these new requirements, the court transforms RCW 71.09 into a statute that looks more like RCW 71.05, and thereby frustrates the Legislature's manifest intent to create a *new* statutory scheme since RCW 71.05 was deemed to be inadequate. *See* RCW 71.09.010.

Moreover, the majority's treatment of the equal protection question is inconsistent with its treatment of due process. In explaining why the incarceration of sexual predators within correctional institutions comports with due process, the majority implies that no less restrictive alternatives would effectively address the problem of preventing sex offenders from committing further crimes. The majority states:

> Given the nature of sexually violent predators, it would not be safe to house them in a less secure setting. . . .
>
> . . . .
>
> . . . Here, the dangerousness of committed sex predators justifies a secure confinement facility.

Majority, at 34-35. Yet with respect to equal protection, the majority concludes that the State has proffered no "valid reason" for treating sexually violent predators differently from persons committed under RCW 71.05. Majority, at 47.

It is also incorrect to aver that the State has put forth no justification for the disparate treatment of sexually violent predators under RCW 71.09. In this regard, the majority again flaunts the express intent of the Legislature, which found that:

> [T]he treatment modalities for [sexually violent predators] are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act.

RCW 71.09.010.

civilly committed. If an individual once committed a sex crime and someone thinks that individual is still dangerous, the Statute authorizes a lifetime term in a mental facility. This is pure preventive detention.

The United States Supreme Court has permitted preventive detention only in the pretrial context and only if the duration of confinement is *strictly limited*, not indefinite as in this case. *See, e.g., United States v. Salerno*, 481 U.S. 739, 747-51, 107 S. Ct. 2095, 2101-04, 95 L. Ed. 2d 697 (1987); *Schall v. Martin*, 467 U.S. 253, 264-71, 104 S. Ct. 2403, 2409-14, 81 L. Ed. 2d 207 (1984); *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S. Ct. 1845, 1858, 32 L. Ed. 2d 435 (1972).

In *Salerno*, the Supreme Court upheld a federal act authorizing pretrial detention of defendants deemed dangerous. The Court noted that preventive detention under the act was "limited by the stringent time limitations of the Speedy Trial Act". *Salerno*, 481 U.S. at 747, 107 S. Ct. at 2101-02. In *Schall*, the Court upheld a state statute authorizing the preventive pretrial detention of juveniles accused of crimes who were deemed dangerous, and the Court noted the maximum possible detention under the act was only 17 days. *Schall*, 467 U.S. at 269-70, 104 S. Ct. at 2412-13. Finally, in *Jackson*, the Court held that a criminal defendant who was incapable of proceeding to trial could be detained only for the reasonable period of time necessary to determine whether a substantial probability existed the defendant would ever become capable to proceed to trial. *Jackson*, 406 U.S. at 738, 92 S. Ct. at 1858. Under this standard, the Court in *Jackson* found the defendant's 3 ½ year confinement excessive because the defendant, a deaf mute, was not expected to ever gain the competency to stand trial.

The Supreme Court has never upheld a lifetime preventive detention scheme for those who are feared dangerous. It was asked to do precisely that in *Foucha*. The

State of Louisiana argued that *Salerno* authorized preventive detention for persons who pose a danger to the community. *Foucha*, 504 U.S. at 80, 112 S. Ct. at 1786. The Court disagreed and distinguished *Salerno* on three grounds. First, the Court noted the statute at issue in *Salerno* was narrowly focused on the most serious of crimes and required a finding that no conditions of release could reasonably assure the safety of the community. *Foucha*, 504 U.S. at 81, 112 S. Ct. at 1786. Second, the Court contrasted the time limits for pretrial detention with the indefinite commitment authorized by the Louisiana law. *Foucha*, 504 U.S. at 81-83, 112 S. Ct. at 1786-87. Finally, the Court pointed out that less restrictive alternatives were available to deal with persistent criminal behavior, including enhanced sentences for recidivists. *Foucha*, 504 U.S. at 82, 112 S. Ct. at 1786-87.

Like the statute in *Foucha*, the sexual predator Statute is fundamentally flawed. Its scope is broad, covering everything from murder-rape to attempted sexually motivated burglary. Its duration is indefinite. Unlike *Salerno*, *Schall*, and *Jackson*, the Statute in this case produces lifetime preventive detention. The Legislature found that "sexually violent predators" are "unamenable to existing mental illness treatment modalities" and that the prognosis for curing them is "poor". RCW 71.09.010. The Statute thus creates a class of persons who, by definition, are not likely to be "cured", and thus not likely to ever be released.

As a result, the Statute does precisely what *Foucha* expressly says the government may not do: confine someone indefinitely as dangerous who is not mentally ill but simply has a personality disorder or antisocial personality. As the Supreme Court noted:

> [T]he State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term.

(Italics mine.) *Foucha*, 504 U.S. at 82-83, 112 S. Ct. at 1787. The Legislature has other options for dealing with sex offenders. Enhanced sentences for repeat offenders and supervised release are but two of the most obvious.

The sexual predator Statute has each of the constitutional weaknesses of the statute in *Foucha*, weaknesses that caused the Supreme Court to consider the *Foucha* statute

> *only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions . . . incarcerates only those who are proved beyond a reasonable doubt to have violated a criminal law.*

(Italics mine.) *Foucha*, 504 U.S. at 83, 112 S. Ct. at 1787. I would hold the sexual predator Statute is an unconstitutional violation of substantive due process.

II

EX POST FACTO AND DOUBLE JEOPARDY

In addition to violating substantive due process, the Statute's commitment provisions violate the constitutional prohibition against ex post facto laws. U.S. Const. art. 1, § 10. A law violates this prohibition if it "makes more burdensome the punishment for a crime, after its commission". *Collins v. Youngblood*, 497 U.S. 37, 42, 110 S. Ct. 2715, 2719, 111 L. Ed. 2d 30 (1990) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169, 46 S. Ct. 68, 68, 70 L. Ed. 216

(1925)). The purpose of the ex post facto prohibition is to give individuals fair warning of the effect of legislative acts and to restrict the power of the State to impose arbitrary or vindictive legislation. *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

The commitment provisions also violate the prohibition on double jeopardy. U.S. Const. amend. 5. The double jeopardy clause protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076-77, 23 L. Ed. 2d 656, 89 S. Ct. 2089, 23 L. Ed. 2d 656 (1969). When the government has already imposed a criminal penalty, the double jeopardy clause precludes the government from seeking additional punishment in a second proceeding if it is dissatisfied with the sanction obtained in the first. *United States v. Halper*, 490 U.S. 435, 449-50, 109 S. Ct. 1892, 1902-03, 104 L. Ed. 2d 487 (1989).

Because RCW 71.09 authorizes retroactive extension of a criminal sentence if the State is dissatisfied with the original length, it violates both of these provisions. The majority argues that these provisions do not apply because the Statute is civil rather than criminal in nature. However, a statute must be deemed criminal in nature when the statute is "so punitive either in purpose or effect" as to negate a legislature's intent to establish a civil statute. *United States v. Ward*, 448 U.S. 242, 248, 100 S. Ct. 2636, 2641, 65 L. Ed. 2d 742 (1980).

The factors to be considered in deciding whether a statute has a criminal or civil purpose include whether the act disavows all interest in punishment, whether it provides treatment, and whether release is possible at any time. *Allen v. Illinois*, 478 U.S. 364, 106 S. Ct. 2988, 92 L. Ed. 2d 296 (1986).

The statute in *Allen* allowed the State to divert persons charged with crimes from the criminal system to the civil system for treatment of mental illness. In contrast, the

sexually violent predator Statute is not an alternative to criminal imprisonment. It allows the State to seek a criminal conviction against an individual, and only after the individual has completed his or her sentence does the Statute purportedly seek to provide specialized "care and treatment" for the individual. *See* RCW 71.09.030, .060. Far from disavowing criminal punishment, such punishment is an essential component of the Statute's commitment provisions.

Although the Statute provides for treatment, this goal is completely subordinated to punishment. An individual's need for diagnosis and treatment is *never* sufficiently compelling under the Statute until the individual is nearing the end of his or her criminal sentence. The timing alone is a strong indication that the Legislature was less interested in treatment than in confinement.

While both the Illinois statute in *Allen* and the Washington Statute provide for an indefinite period of confinement, there are important procedural differences. In Illinois, an individual may file a petition for release at any time and is entitled to a case review every 6 months. The court is required to hear all petitions. Here a petition for release normally must be authorized by the Department of Social and Health Services. Although an individual may petition over the Department's objection, he or she must then prevail at a show cause hearing in order to obtain a trial. Once a person has petitioned over the Department's objection and been denied, the court is mandated to deny subsequent petitions unless the person can make a showing of changed circumstances in the petition itself. Case reviews are conducted only once a year.

Based on a comparison of these factors, RCW 71.09 is punitive in purpose and effect. Therefore, the prohibitions against ex post facto laws and double jeopardy apply here, and the Statute is unconstitutional.

In conclusion, I would hold that Washington's sexually violent predator Statute, RCW 71.09, violates

petitioners' rights to substantive due process and violates the constitutional prohibition against ex post facto laws and double jeopardy.

UTTER and SMITH, JJ., concur with JOHNSON, J.

CHAPTER 71.09
SEXUALLY VIOLENT PREDATORS

Section

71.09.010. Findings.
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71.09.030. Sexually violent predator petition—Prosecuting attorney or attorney general may file.
71.09.040. Sexually violent predator petition—Judicial determination—Transfer for evaluation.
71.09.050. Trial—Rights of parties.
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71.09.080. Detention and commitment to conform to constitutional requirements.
71.09.090. Petition for release—Procedures.
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71.09.900 Index, part headings not law—1990 c 3.
71.09.901 Severability—1990 c 3.
71.09.902 Effective dates—Application—1990 c 3.

71.09.010 Findings.

The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act, chapter 71.05 RCW, which is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under chapter 71.05 RCW, sexually violent predators generally have antisocial personality features which are unamenable to

existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sex offenders' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment act, chapter 71.05 RCW, is inadequate to address the risk to reoffend because during confinement these offenders do not have access to potential victims and therefore they will not engage in an overt act during confinement as required by the involuntary treatment act for continued confinement. The legislature further finds that the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act.

Enacted by Laws 1990, ch. 3, § 1001, eff. July 1, 1990.

71.09.020 Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence.

(2) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

(3) "Predatory" means acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization.

(4) "Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child

in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to chapter 71.09 RCW, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

Enacted by Laws 1990, ch. 3, § 1002, eff. July 1, 1990. Amended by Laws 1990, 1st Ex.Sess., ch. 12, § 2, eff. July 1, 1990.

71.09.030 Sexually violent predator petition—Prosecuting attorney or attorney general may file.

When it appears that: (1) The sentence of a person who has been convicted of a sexually violent offense is about to expire, or has expired on, before, or after July 1, 1990; (2) the term of confinement of a person found to have committed a sexually violent offense as a juvenile is about to expire, or has expired on, before, or after July 1, 1990; (3) a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial is about to be released, or has been released on, before, or after July 1, 1990, pursuant to RCW 10.77.090(3); or (4) a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released, or has been released on, before, or after July 1, 1990, pursuant to RCW

10.77.020(3); and it appears that the person may be a sexually violent predator, the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a "sexually violent predator" and stating sufficient facts to support such allegation.

Enacted by Laws 1990, ch. 3, § 1003, eff. July 1, 1990. Amended by Laws 1990, 1st Ex.Sess., ch. 12, § 3, eff. July 1, 1990.

71.09.040 Sexually violent predator petition—Judicial determination—Transfer for evaluation.

Upon the filing of a petition under RCW 71.09.030, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If such determination is made the judge shall direct that the person be taken into custody and the person shall be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services. In adopting such rules, the department of social and health services shall consult with the department of health and the department of corrections.

Enacted by Laws 1990, ch. 3, § 1004, eff. July 1, 1990.

71.09.050 Trial—Rights of parties.

Within forty-five days after the filing of a petition pursuant to RCW 71.09.030, the court shall conduct a trial to determine whether the person is a sexually violent predator. At all stages of the proceedings under this chapter, any person subject to this chapter shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist him or her. Whenever any person is subjected to an examination under this chapter, he or she may retain experts or professional persons to perform an examination on their behalf. When the person wishes to be examined by a qualified expert or professional person of his or her own choice, such examiner shall be permitted to

have reasonable access to the person for the purpose of such examination, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf. The person, the prosecuting attorney or attorney general, or the judge shall have the right to demand that the trial be before a jury. If no demand is made, the trial shall be before the court.

Enacted by Laws 1990, ch. 3, § 1005, eff. July 1, 1990.

71.09.060 Trial—Determination—Commitment procedures

(1) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If the state alleges that the prior sexually violent offense that forms the basis for the petition for commitment was an act that was sexually motivated as provided in RCW 71.09.020(4)(c), the state must prove beyond a reasonable doubt that the alleged sexually violent act was sexually motivated as defined in RCW 9.94A.030. If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the department of social and health services in a secure facility for control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large. Such control, care, and treatment shall be provided at a facility operated by the department of social and health services. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct the person's release.

(2) If the person charged with a sexually violent offense has been found incompetent to stand trial, and is about to or has been released pursuant to RCW 10.77.090(3), and his or her commitment is sought pursuant to subsection (1) of this section, the court shall first hear evidence and determine whether the person did commit the act or acts charged if the court did not enter a finding prior to dismissal under RCW 10.77.090(3) that the person committed the act or acts charged. The hearing on this issue must comply with

all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on his or her own behalf, the extent to which the evidence could be reconstructed without the assistance of the person, and the strength of the prosecution's case. If, after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, it shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

(3) The state shall comply with RCW 10.77.220 while confining the person pursuant to this chapter. The facility shall not be located on the grounds of any state mental facility or regional habilitation center because these institutions are insufficiently secure for this population.

Enacted by Laws 1990, ch. 3, § 1006, eff. July 1, 1990. Amended by Laws 1990, 1st Ex.Sess., ch. 12, § 4, eff. July 1, 1990.

71.09.070 Annual examinations

Each person committed under this chapter shall have a current examination of his or her mental condition made at least once every year. The person may retain, or if he or she is indigent and so requests, the court may appoint a qualified expert or a professional person to examine him or her, and such expert or professional person shall have access to all records concerning the person. The periodic report shall be provided to the court that committed the person under this chapter.

Enacted by Laws 1990, ch. 3, § 1007, eff. July 1, 1990.

71.09.080 Detention and commitment to conform to constitutional requirements.

The involuntary detention or commitment of persons under this chapter shall conform to constitutional requirements for care and treatment.

Enacted by Laws 1990, ch. 3, § 1008, eff. July 1, 1990.

71.09.090 Petition for release—Procedures.

(1) If the secretary of the department of social and health services determines that the person's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence if released, the secretary shall authorize the person to petition the court for release. The petition shall be served upon the court and the prosecuting attorney. The court, upon receipt of the petition for release, shall within forty-five days order a hearing. The prosecuting attorney or the attorney general, if requested by the county, shall represent the state, and shall have the right to have the petitioner examined by an expert or professional person of his or her choice. The hearing shall be before a jury if demanded by either the petitioner or the prosecuting attorney or attorney general. The burden of proof shall be upon the prosecuting attorney or attorney general to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and that if discharged is likely to commit predatory acts of sexual violence.

(2) Nothing contained in this chapter shall prohibit the person from otherwise petitioning the court for discharge without the secretary's approval. The secretary shall provide the committed person with an annual written notice of the person's right to petition the court for release over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall forward the notice and waiver form to the court with the annual report. If the person does not affirmatively waive the right to petition, the court shall set a show cause hearing to determine whether facts exist that warrant a hearing on whether the person's condition has so changed that he or she is safe to be at large. The committed person shall have a right to have an attorney represent him or

her at the show cause hearing but the person is not entitled to be present at the show cause hearing. If the court at the show cause hearing determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged, then the court shall set a hearing on the issue. At the hearing, the committed person shall be entitled to be present and to the benefit of all constitutional protections that were afforded to the person at the initial commitment proceeding. The prosecuting attorney or the attorney general if requested by the county shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to have experts evaluate him or her on his or her behalf and the court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large and if released will engage in acts of sexual violence.

Enacted by Laws 1990, ch. 3, § 1009, eff. July 1, 1990.

71.09.100 Subsequent petitions.

Nothing in this chapter shall prohibit a person from filing a petition for discharge pursuant to this chapter. However, if a person has previously filed a petition for discharge without the secretary's approval and the court determined, either upon review of the petition or following a hearing, that the petitioner's petition was frivolous or that the petitioner's condition had not so changed that he or she was safe to be at large, then the court shall deny the subsequent petition unless the petition contains facts upon which a court could find that the condition of the petitioner had so changed that a hearing was warranted. Upon receipt of a first or subsequent petition from committed persons without the secretary's approval, the court shall endeavor whenever possible to review the petition and determine if the petition is based upon frivolous grounds and if so shall deny the petition without a hearing.

Enacted by Laws 1990, ch. 3, § 1010, eff. July 1, 1990.

71.09.110 Department of social and health services Duties—Reimbursement.

The department of social and health services shall be responsible for all costs relating to the evaluation and treatment of persons committed to their custody under any provision of this chapter. Reimbursement may be obtained by the department for the cost of care and treatment of persons committed to its custody pursuant to RCW 43.20B.330 through 43.20B.370.

Enacted by Laws 1990, ch. 3, § 1011, eff. July 1, 1990.

71.09.120 Release of information authorized.

In addition to any other information required to be released under this chapter, the department is authorized, pursuant to RCW 4.24.550, to release relevant information that is necessary to protect the public, concerning a specific sexually violent predator committed under this chapter.

Enacted by Laws 1990, ch. 3, § 1012, eff. July 1, 1990.

71.09.900 Index, part headings not law—1990 c 3.

See RCW 18.155.900.

71.09.901 Severability—1990 c 3.

See RCW 18.155.901.

71.09.902 Effective dates—Application—1990 c 3.

See RCW 18.155.902.

Chapter 71.09
SEXUALLY VIOLENT PREDATORS

Sections

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71.09.902 Effective dates—Application—1990 c 3.

71.09.010 Findings.

The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act, chapter 71.05 RCW, which is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under chapter 71.05 RCW, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sex offenders' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment act, chapter 71.05 RCW, is inadequate to address the risk to reoffend because during confinement these offenders do not have access to potential victims and therefore they will not engage in an overt act during confinement as required by the involuntary treatment act for continued confinement. The legislature further finds that the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act. [1990 c 3 § 1001.]

71.09.020 Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

(2) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

(3) "Likely to engage in predatory acts of sexual violence" means that the person more probably than not will engage in such acts. Such likelihood must be evidenced by a recent overt act if the person is not totally confined at the time the petition is filed under RCW 71.09.030.

(4) "Predatory" means acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization.

(5) "Recent overt act" means any act that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm.

(6) "Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent

offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to chapter 71.09 RCW, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

(7) "Less restrictive alternative" means court-ordered treatment in a setting less restrictive than total confinement.

(8) "Secretary" means the secretary of social and health services or his or her designee. [1995 c 216 § 1; 1992 c 145 § 17; 1990 1st ex.s. c 12 § 2; 1990 c 3 § 1002.]

Effective date—1990 1st ex.s. c 12: See note following RCW 13.40.020.

71.09.025 Notice to prosecuting attorney prior to release.

(1)(a) When it appears that a person may meet the criteria of a sexually violent predator as defined in RCW 71.09.020(1), the agency with jurisdiction shall refer the person in writing to the prosecuting attorney of the county where that person was charged, three months prior to:

(i) The anticipated release from total confinement of a person who has been convicted of a sexually violent offense;

(ii) The anticipated release from total confinement of a person found to have committed a sexually violent offense as a juvenile;

(iii) Release of a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial pursuant to *RCW 10.77.090(3); or

(iv) Release of a person who has been found not guilty by reason of insanity of a sexually violent offense pursuant to **RCW 10.77.020(3).

(b) The agency shall provide the prosecutor with all relevant information including but not limited to the following information:

(i) A complete copy of the institutional records compiled by the department of corrections relating to the person, and any such out-of-state department of corrections' records, if available;

(ii) A complete copy, if applicable, of any file compiled by the indeterminate sentence review board relating to the person;

(iii) All records relating to the psychological or psychiatric evaluation and/or treatment of the person;

(iv) A current record of all prior arrests and convictions, and full police case reports relating to those arrests and convictions; and

(v) A current mental health evaluation or mental health records review.

(2) This section applies to acts committed before, on, or after March 26, 1992.

(3) The agency, its employees, and officials shall be immune from liability for any good-faith conduct under this section.

(4) As used in this section, "agency with jurisdiction" means that agency with the authority to direct the release of a person serving a sentence or term of confinement and includes the department of corrections, the indeterminate sentence review board, and the department of social and health services. [1995 c 216 § 2; 1992 c 45 § 3.]

Reviser's note: *(1) RCW 10.77.090 was amended by 1998 c 297 § 38, changing subsection (3) to subsection (4).

**(2) RCW 10.77.020 was amended by 1998 c 297 § 30, deleting subsection (3).

Severability—Application—1992 c 45: See notes following RCW 9.94A.151.

71.09.030 Sexually violent predator petition—Filing.

When it appears that: (1) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement on, before, or after July 1, 1990; (2) a person found to have committed a sexually violent offense as a juvenile is about to be released from total confinement on, before, or after July 1, 1990; (3) a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial is about to be released, or has been released on, before, or after July 1, 1990, pursuant to *RCW 10.77.090(3); (4) a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released, or has been released on, before, or after July 1, 1990, pursuant to RCW **10.77.020(3), 10.77.110 (1) or (3), or 10.77.150; or (5) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act; and it appears that the person may be a sexually violent predator, the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a "sexually violent predator" and stating sufficient facts to support such allegation. [1995 c 216 § 3; 1992 c 45 § 4; 1990 1st ex.s. c 12 § 3; 1990 c 3 § 1003.]

Reviser's note: *(1) RCW 10.77.090 was amended by 1998 c 297 § 38, changing subsection (3) to subsection (4).

**(2) RCW 10.77.020 was amended by 1998 c 297 § 30, deleting subsection (3).

Severability—Application—1992 c 45: See notes following RCW 9.94A.151.

Effective date—1990 1st ex.s. c 12: See note following RCW 13.40.020.

71.09.040 Sexually violent predator petition—Probable cause hearing—Judicial determination—Transfer for evaluation.

(1) Upon the filing of a petition under RCW 71.09.030, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If such determination is made the judge shall direct that the person be taken into custody.

(2) Within seventy-two hours after a person is taken into custody pursuant to subsection (1) of this section, the court shall provide the person with notice of, and an opportunity to appear in person at, a hearing to contest probable cause as to whether the person is a sexually violent predator. At this hearing, the court shall (a) verify the person's identity, and (b) determine whether probable cause exists to believe that the person is a sexually violent predator. At the probable cause hearing, the state may rely upon the petition and certification for determination of probable cause filed pursuant to RCW 71.09.030. The state may supplement this with additional documentary evidence or live testimony.

(3) At the probable cause hearing, the person shall have the following rights in addition to the rights previously specified: (a) To be represented by counsel; (b) to present evidence on his or her behalf; (c) to cross-examine witnesses

who testify against him or her; (d) to view and copy all petitions and reports in the court file.

(4) If the probable cause determination is made, the judge shall direct that the person be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services. In adopting such rules, the department of social and health services shall consult with the department of health and the department of corrections. In no event shall the person be released from confinement prior to trial. [1995 c 216 § 4; 1990 c 3 § 1004.]

71.09.050 Trial—Rights of parties.

(1) Within forty-five days after the completion of any hearing held pursuant to RCW 71.09.040, the court shall conduct a trial to determine whether the person is a sexually violent predator. The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent will not be substantially prejudiced. At all stages of the proceedings under this chapter, any person subject to this chapter shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist him or her. The person shall be confined in a secure facility for the duration of the trial.

(2) Whenever any person is subjected to an examination under this chapter, he or she may retain experts or professional persons to perform an examination on their behalf. When the person wishes to be examined by a qualified expert or professional person of his or her own choice, such examiner shall be permitted to have reasonable access to the person for the purpose of such examination, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall, upon the person's request, assist the person in

obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf.

(3) The person, the prosecuting attorney or attorney general, or the judge shall have the right to demand that the trial be before a twelve-person jury. If no demand is made, the trial shall be before the court. [1995 c 216 § 5; 1990 c 3 § 1005.]

71.09.060 Trial—Determination—Commitment procedures.

(1) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. When the determination is made by a jury, the verdict must be unanimous.

If, on the date that the petition is filed, the person was living in the community after release from custody, the state must also prove beyond a reasonable doubt that the person had committed a recent overt act. If the state alleges that the prior sexually violent offense that forms the basis for the petition for commitment was an act that was sexually motivated as provided in RCW 71.09.020(6)(c), the state must prove beyond a reasonable doubt that the alleged sexually violent act was sexually motivated as defined in RCW 9.94A.030. If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the department of social and health services for placement in a secure facility operated by the department of social and health services for control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe either (a) to be at large, or (b) to be released to a less restrictive alternative as set forth in RCW 71.09.092. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct the person's release.

(2) If the person charged with a sexually violent offense has been found incompetent to stand trial, and is

about to or has been released pursuant to *RCW 10.77.090(3), and his or her commitment is sought pursuant to subsection (1) of this section, the court shall first hear evidence and determine whether the person did commit the act or acts charged if the court did not enter a finding prior to dismissal under *RCW 10.77.090(3) that the person committed the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on his or her own behalf, the extent to which the evidence could be reconstructed without the assistance of the person, and the strength of the prosecution's case. If, after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, it shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

(3) The state shall comply with RCW 10.77.220 while confining the person pursuant to this chapter, except that during all court proceedings the person shall be detained in a secure facility. The department shall not place the person, even temporarily, in a facility on the grounds of any state mental facility or regional habilitation center because these institutions are insufficiently secure for this population. [1998 c 146 § 1; 1995 c 216 § 6; 1990 1st ex.s. c 12 § 4; 1990 c 3 § 1006.]

***Reviser's note:** RCW 10.77.090 was amended by 1998 c 297 § 38, changing subsection (3) to subsection (4).

Effective date—1998 c 146: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 25, 1998]." [1998 c 146 § 2.]

Effective date—1990 1st ex.s. c 12: See note following RCW 13.40.020.

71.09.070 Annual examinations of persons committed under chapter.

Each person committed under this chapter shall have a current examination of his or her mental condition made at least once every year. The annual report shall include consideration of whether conditional release to a less restrictive alternative is in the best interest of the person and will adequately protect the community. The person may retain, or if he or she is indigent and so requests, the court may appoint a qualified expert or a professional person to examine him or her, and such expert or professional person shall have access to all records concerning the person. The periodic report shall be provided to the court that committed the person under this chapter. [1995 c 216 § 7; 1990 c 3 § 1007.]

71.09.080 Rights of persons committed under this chapter.

(1) Any person subjected to restricted liberty as a sexually violent predator pursuant to this chapter shall not forfeit any legal right or suffer any legal disability as a consequence of any actions taken or orders made, other than as specifically provided in this chapter.

(2) Any person committed pursuant to this chapter has the right to adequate care and individualized treatment. The department of social and health services shall keep

records detailing all medical, expert, and professional care and treatment received by a committed person, and shall keep copies of all reports of periodic examinations made pursuant to this chapter. All such records and reports shall be made available upon request only to: The committed person, his or her attorney, the prosecuting attorney, the court, the protection and advocacy agency, or another expert or professional person who, upon proper showing, demonstrates a need for access to such records.

(3) At the time a person is taken into custody or transferred into a facility pursuant to a petition under this chapter, the professional person in charge of such facility or his or her designee shall take reasonable precautions to inventory and safeguard the personal property of the persons detained or transferred. A copy of the inventory, signed by the staff member making it, shall be given to the person detained and shall, in addition, be open to inspection to any responsible relative, subject to limitations, if any, specifically imposed by the detained person. For purposes of this subsection, "responsible relative" includes the guardian, conservator, attorney, spouse, parent, adult child, or adult brother or sister of the person. The facility shall not disclose the contents of the inventory to any other person without consent of the patient or order of the court.

(4) Nothing in this chapter prohibits a person presently committed from exercising a right presently available to him or her for the purpose of obtaining release from confinement, including the right to petition for a writ of habeas corpus.

(5) No indigent person may be conditionally released or unconditionally discharged under this chapter without suitable clothing, and the secretary shall furnish the person with such sum of money as is required by RCW 72.02.100 for persons without ample funds who are released from correctional institutions. As funds are available, the secretary may provide payment to the indigent persons conditionally

released pursuant to this chapter consistent with the optional provisions of RCW 72.02.100 and 72.02.110, and may adopt rules to do so. [1995 c 216 § 8; 1990 c 3 § 1008.]

71.09.090 Petition for conditional release to less restrictive alternative or unconditional discharge—Procedures.

(1) If the secretary determines that the person's mental abnormality or personality disorder has so changed that the person is not likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged, the secretary shall authorize the person to petition the court for conditional release to a less restrictive alternative or unconditional discharge. The petition shall be served upon the court and the prosecuting attorney. The court, upon receipt of the petition for conditional release to a less restrictive alternative or unconditional discharge, shall within forty-five days order a hearing. The prosecuting attorney or the attorney general, if requested by the county, shall represent the state, and shall have the right to have the petitioner examined by an expert or professional person of his or her choice. The hearing shall be before a jury if demanded by either the petitioner or the prosecuting attorney or attorney general. The burden of proof shall be upon the prosecuting attorney or attorney general to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and that if conditionally released to a less restrictive alternative or unconditionally discharged is likely to engage in predatory acts of sexual violence.

(2) Nothing contained in this chapter shall prohibit the person from otherwise petitioning the court for conditional release to a less restrictive alternative or unconditional discharge without the secretary's approval. The secretary shall provide the committed person with an annual written notice of the person's right to petition the

court for conditional release to a less restrictive alternative or unconditional discharge over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall forward the notice and waiver form to the court with the annual report. If the person does not affirmatively waive the right to petition, the court shall set a show cause hearing to determine whether facts exist that warrant a hearing on whether the person's condition has so changed that he or she is safe to be conditionally released to a less restrictive alternative or unconditionally discharged. The committed person shall have a right to have an attorney represent him or her at the show cause hearing but the person is not entitled to be present at the show cause hearing. If the court at the show cause hearing determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is not likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged, then the court shall set a hearing on the issue. At the hearing, the committed person shall be entitled to be present and to the benefit of all constitutional protections that were afforded to the person at the initial commitment proceeding. The prosecuting attorney or the attorney general if requested by the county shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to have experts evaluate him or her on his or her behalf and the court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged.

(3) The jurisdiction of the court over a person civilly committed pursuant to this chapter continues until such time

as the person is unconditionally discharged. [1995 c 216 § 9; 1992 c 45 § 7; 1990 c 3 § 1009.]

Severability—Application—1992 c 45: See notes following RCW 9.94A.151.

71.09.092 Conditional release to less restrictive alternative—Findings.

Before the court may enter an order directing conditional release to a less restrictive alternative, it must find the following: (1) The person will be treated by a treatment provider who is qualified to provide such treatment in the state of Washington under chapter 18.155 RCW; (2) the treatment provider has presented a specific course of treatment and has agreed to assume responsibility for such treatment and will report progress to the court on a regular basis, and will report violations immediately to the court, the prosecutor, the supervising community corrections officer, and the superintendent of the special commitment center; (3) housing exists that is sufficiently secure to protect the community, and the person or agency providing housing to the conditionally released person has agreed in writing to accept the person, to provide the level of security required by the court, and immediately to report to the court, the prosecutor, the supervising community corrections officer, and the superintendent of the special commitment center if the person leaves the housing to which he or she has been assigned without authorization; (4) the person is willing to comply with the treatment provider and all requirements imposed by the treatment provider and by the court; and (5) the person is willing to comply with supervision requirements imposed by the department of corrections. [1995 c 216 § 10.]

71.09.094 Conditional release to less restrictive alternative—Verdict.

(1) Upon the conclusion of the evidence in a hearing held pursuant to RCW 71.09.090, if the court finds that there

is no legally sufficient evidentiary basis for a reasonable jury to find that the conditions set forth in RCW 71.09.092 have been met, the court shall grant a motion by the state for a judgment as a matter of law on the issue of conditional release to a less restrictive alternative.

(2) Whenever the issue of conditional release to a less restrictive alternative is submitted to the jury, the court shall instruct the jury to return a verdict in substantially the following form: Has the state proved beyond a reasonable doubt that the proposed less restrictive alternative is not in the best interests of respondent or will not adequately protect the community? Answer: Yes or No. [1995 c 216 § 11.]

71.09.096 Conditional release to less restrictive environment—Judgment—Conditions—Annual review.

(1) If the court or jury determines that conditional release to a less restrictive alternative is in the best interest of the person and will adequately protect the community, and the court determines that the minimum conditions set forth in *section 9 of this act are met, the court shall enter judgment and direct a conditional release.

(2) The court shall impose any additional conditions necessary to ensure compliance with treatment and to protect the community. If the court finds that conditions do not exist that will both ensure the person's compliance with treatment and protect the community, then the person shall be remanded to the custody of the department of social and health services for control, care, and treatment in a secure facility as designated in RCW 71.09.060(1).

(3) If the service provider designated to provide inpatient or outpatient treatment or to monitor or supervise any other terms and conditions of a person's placement in a less restrictive alternative is other than the department of social and health services or the department of corrections, then the service provider so designated must agree in writing to provide such treatment.

(4) Prior to authorizing any release to a less restrictive alternative, the court shall impose such conditions upon the person as are necessary to ensure the safety of the community. The court shall order the department of corrections to investigate the less restrictive alternative and recommend any additional conditions to the court. These conditions shall include, but are not limited to the following: Specification of residence, prohibition of contact with potential or past victims, prohibition of alcohol and other drug use, participation in a specific course of inpatient or outpatient treatment that may include monitoring by the use of polygraph and plethysmograph, supervision by a department of corrections community corrections officer, a requirement that the person remain within the state unless the person receives prior authorization by the court, and any other conditions that the court determines are in the best interest of the person or others. A copy of the conditions of release shall be given to the person and to any designated service providers.

(5) Any service provider designated to provide inpatient or outpatient treatment shall monthly, or as otherwise directed by the court, submit to the court, to the department of social and health services facility from which the person was released, to the prosecutor of the county in which the person was found to be a sexually violent predator, and to the supervising community corrections officer, a report stating whether the person is complying with the terms and conditions of the conditional release to a less restrictive alternative.

(6) Each person released to a less restrictive alternative shall have his or her case reviewed by the court that released him or her no later than one year after such release and annually thereafter until the person is unconditionally discharged. Review may occur in a shorter time or more frequently, if the court, in its discretion on its own motion, or on motion of the person, the secretary, or the

prosecuting attorney so determines. The sole question to be determined by the court is whether the person shall continue to be conditionally released to a less restrictive alternative. The court in making its determination shall be aided by the periodic reports filed pursuant to subsection (5) of this section and the opinions of the secretary and other experts or professional persons. [1995 c 216 § 12.]

***Reviser's note:** The reference to "section 9 of this act" literally translates to the 1995 c 216 amendments to RCW 71.09.090, which appears to be an erroneous reference. Reference to RCW 71.09.092, "section 10 of this act," was apparently intended.

71.09.098 Conditional release to less restrictive alternative—Hearing on revocation or modification—Authority to apprehend conditionally released person.

(1) Any service provider submitting reports pursuant to RCW 71.09.096(5), the supervising community corrections officer, the prosecuting attorney, or the attorney general may petition the court, or the court on its own motion may schedule an immediate hearing, for the purpose of revoking or modifying the terms of the person's conditional release to a less restrictive alternative if the petitioner or the court believes the released person is not complying with the terms and conditions of his or her release or is in need of additional care and treatment.

(2) If the prosecuting attorney, the supervising community corrections officer, or the court, based upon information received by them, reasonably believes that a conditionally released person is not complying with the terms and conditions of his or her conditional release to a less restrictive alternative, the court or community corrections officer may order that the conditionally released person be apprehended and taken into custody until such time as a hearing can be scheduled to determine the facts and whether or not the person's conditional release should be revoked or modified. The court shall be notified before the close of the

next judicial day of the person's apprehension. Both the prosecuting attorney and the conditionally released person shall have the right to request an immediate mental examination of the conditionally released person. If the conditionally released person is indigent, the court shall, upon request, assist him or her in obtaining a qualified expert or professional person to conduct the examination.

(3) The court, upon receiving notification of the person's apprehension, shall promptly schedule a hearing. The issue to be determined is whether the state has proven by a preponderance of the evidence that the conditionally released person did not comply with the terms and conditions of his or her release. Hearsay evidence is admissible if the court finds it otherwise reliable. At the hearing, the court shall determine whether the person shall continue to be conditionally released on the same or modified conditions or whether his or her conditional release shall be revoked and he or she shall be committed to total confinement, subject to release only in accordance with provisions of this chapter. [1995 c 216 § 13.]

71.09.110 Department of social and health services—Duties—Reimbursement.

The department of social and health services shall be responsible for all costs relating to the evaluation and treatment of persons committed to their custody whether in a secure facility or under a less restrictive alternative under any provision of this chapter. Reimbursement may be obtained by the department for the cost of care and treatment of persons committed to its custody whether in a secure facility or under a less restrictive alternative pursuant to RCW 43.20B.330 through 43.20B.370. [1995 c 216 § 14; 1990 c 3 § 1011.]

71.09.115 Record check required for employees of secure facility.

(1) The safety and security needs of the secure facility operated by the department of social and health services pursuant to RCW 71.09.060(1) make it vital that employees working in the facility meet necessary character, suitability, and competency qualifications. The secretary shall require a record check through the Washington state patrol criminal identification system under chapter 10.97 RCW and through the federal bureau of investigation. The record check must include a fingerprint check using a complete Washington state criminal identification fingerprint card. The criminal history record checks shall be at the expense of the department. The secretary shall use the information only in making the initial employment or engagement decision, except as provided in subsection (2) of this section. Further dissemination or use of the record is prohibited.

(2) This section applies to all current employees hired prior to June 6, 1996, who have not previously submitted to a department of social and health services criminal history records check. The secretary shall use the information only in determining whether the current employee meets the necessary character, suitability, and competency requirements for employment or engagement. [1996 c 27 § 1.]

71.09.120 Release of information authorized.

In addition to any other information required to be released under this chapter, the department is authorized, pursuant to RCW 4.24.550, to release relevant information that is necessary to protect the public, concerning a specific sexually violent predator committed under this chapter. [1990 c 3 § 1012.]

71.09.130 Notice of escape or disappearance.

In the event of an escape by a person committed under this chapter from a state institution or the disappearance of such a person while on conditional release, the superintendent or community corrections officer shall

notify the following as appropriate: Local law enforcement officers, other governmental agencies, the person's relatives, and any other appropriate persons about information necessary for the public safety or to assist in the apprehension of the person. [1995 c 216 § 16.]

71.09.140 Notice of conditional release or unconditional discharge—Notice of escape and recapture.

(1) . . the earliest possible date, and in no event later than thirty days before conditional release or unconditional discharge, except in the event of escape, the department of social and health services shall send written notice of conditional release, unconditional discharge, or escape, to the following:

(a) The chief of police of the city, if any, in which the person will reside or in which placement will be made under a less restrictive alternative;

(b) The sheriff of the county in which the person will reside or in which placement will be made under a less restrictive alternative; and

(c) The sheriff of the county where the person was last convicted of a sexually violent offense, if the department does not know where the person will reside.

The department shall notify the state patrol of the release of all sexually violent predators and that information shall be placed in the Washington crime information center for dissemination to all law enforcement.

(2) The same notice as required by subsection (1) of this section shall be sent to the following if such notice has been requested in writing about a specific person found to be a sexually violent predator under this chapter:

(a) The victim or victims of any sexually violent offenses for which the person was convicted in the past or the victim's next of kin if the crime was a homicide. "Next of kin" as used in this section means a person's spouse, parents, siblings, and children;

(b) Any witnesses who testified against the person in his or her commitment trial under RCW 71.09.060; and

(c) Any person specified in writing by the prosecuting attorney.

Information regarding victims, next of kin, or witnesses requesting the notice, information regarding any other person specified in writing by the prosecuting attorney to receive the notice, and the notice are confidential and shall not be available to the committed person.

(3) If a person committed as a sexually violent predator under this chapter escapes from a department of social and health services facility, the department shall immediately notify, by the most reasonable and expedient means available, the chief of police of the city and the sheriff of the county in which the committed person resided immediately before his or her commitment as a sexually violent predator, or immediately before his or her incarceration for his or her most recent offense. If previously requested, the department shall also notify the witnesses and the victims of the sexually violent offenses for which the person was convicted in the past or the victim's next of kin if the crime was a homicide. If the person is recaptured, the department shall send notice to the persons designated in this subsection as soon as possible but in no event later than two working days after the department learns of such recapture.

(4) If the victim or victims of any sexually violent offenses for which the person was convicted in the past or the victim's next of kin, or any witness is under the age of sixteen, the notice required by this section shall be sent to the parents or legal guardian of the child.

(5) The department of social and health services shall send the notices required by this chapter to the last address provided to the department by the requesting party. The

requesting party shall furnish the department with a current address.

(6) Nothing in this section shall impose any liability upon a chief of police of a city or sheriff of a county for failing to request in writing a notice as provided in subsection (1) of this section. [1995 c 216 § 17.]

71.09.200 Escorted leave—Definitions.

For purposes of RCW 71.09.210 through 71.09.230:

(1) "Escorted leave" means a leave of absence from a facility housing persons detained or committed pursuant to this chapter under the continuous supervision of an escort.

(2) "Escort" means a correctional officer or other person approved by the superintendent or the superintendent's designee to accompany a resident on a leave of absence and be in visual or auditory contact with the resident at all times.

(3) "Resident" means a person detained or committed pursuant to this chapter. [1995 c 216 § 18.]

71.09.210 Escorted leave—Conditions.

The superintendent of any facility housing persons detained or committed pursuant to this chapter may, subject to the approval of the secretary, grant escorted leaves of absence to residents confined in such institutions to:

(1) Go to the bedside of the resident's wife, husband, child, mother or father, or other member of the resident's immediate family who is seriously ill;

(2) Attend the funeral of a member of the resident's immediate family listed in subsection (1) of this section; and

(3) Receive necessary medical or dental care which is not available in the institution. [1995 c 216 § 19.]

71.09.220 Escorted leave—Notice.

A resident shall not be allowed to start a leave of absence under RCW 71.09.210 until the secretary, or the secretary's designee, has notified any county and city law enforcement agency having jurisdiction in the area of the resident's destination. [1995 c 216 § 20.]

71.09.230 Escorted leave—Rules.

(1) The secretary is authorized to adopt rules providing for the conditions under which residents will be granted leaves of absence and providing for safeguards to prevent escapes while on leaves of absence. Leaves of absence granted to residents under RCW 71.09.210, however, shall not allow or permit any resident to go beyond the boundaries of this state.

(2) The secretary shall adopt rules requiring reimbursement of the state from the resident granted leave of absence, or the resident's family, for the actual costs incurred arising from any leave of absence granted under the authority of RCW 71.09.210 (1) and (2). No state funds shall be expended in connection with leaves of absence granted under RCW 71.09.210 (1) and (2) unless the resident and the resident's immediate family are indigent and without resources sufficient to reimburse the state for the expenses of such leaves of absence. [1995 c 216 § 21.]

71.09.900 Index, part headings not law—1990 c 3.

See RCW 18.155.900.

71.09.901 Severability—1990 c 3.

See RCW 18.155.901.

71.09.902 Effective dates—Application—1990 c 3.

See RCW 18.155.902.